17-110

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 1130.

JOHN BUSH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

**FILED OCTOBER 31, 1882.**

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INDEX.

PROCEEDINGS IN COURT OF APPEALS


| | Original. | Print. |
|---|---|---|
| Cause set for hearing | 1 | 1 |
| Cause continued | 1 | 1 |
| Cause argued and submitted | 1 | 1 |
| Judgment | 2 | 1 |
| Opinion | 3 | 1 |
| Petition for rehearing filed | 10 | 5 |
| Petition for rehearing denied | 10 | 5 |
| Writ of error | 11 | 6 |
| Citation | 13 | 6 |
| Petition for writ of error | 16 | 7 |
| Allowance of writ of error | 19 | 8 |
| Transcript from Fayette circuit court filed | 19 | 8 |
| Caption | 20 | 8 |
| Indictment | 20 | 8 |
| Affidavit of defendant tendered and refused | 22 | 9 |
| Cause continued | 22 | 9 |
| Order for special venire | 23 | 9 |
| Cause continued | 23 | 9 |
| Order for special venire | 24 | 9 |
| Motion to set aside indictment | 24 | 10 |
| Motion to set aside panel of petit jurors | 27 | 10 |
| Petition for removal of case to circuit court of the United States filed and denied | 28 | 10 |
| Trial | 28 | 11 |
| Verdict | 30 | 11 |
| Judgment | 30 | 11 |
| Motion for new trial filed and denied | 32 | 11 |
| Bill of exceptions tendered and signed | 32 | 12 |
| Appeal granted and judgment stayed | 32 | 12 |

| | Original. | Print. |
|---|---|---|
| Bill of exceptions | 33 | 12 |
| Affidavit as to jurisdiction | 34 | 12 |
| Indictment | 37 | 13 |
| Trial | 39 | 14 |
| Verdict | 39 | 14 |
| Judgment | 40 | 14 |
| Proceedings in circuit court of the United States | 40 | 14 |
| Trial in Fayette circuit court | 45 | 15 |
| Testimony of James Vanmeter | 45 | 15 |
| C. C. Moose | 52 | 17 |
| Luther Darnaby | 59 | 18 |
| Thornton Vanmeter | 64 | 19 |
| Amanda Price | 65 | 19 |
| Dr. Bennett | 69 | 20 |
| Dr. Coleman | 71 | 20 |
| Dr. H. M. Skillman | 74 | 21 |
| Dr. M. T. Scott | 76 | 21 |
| Mary Bush | 77 | 22 |
| Dr. J. W. Scott | 80 | 22 |
| Dr. B. W. Dudley | 81 | 23 |
| Dr. A. S. Allen | 83 | 23 |
| Dr. J. T. Bryan | 85 | 23 |
| Dr. W. O. Sweeny | 87 | 24 |
| J. W. Wallis | 88 | 24 |
| Dr. Coleman (recalled) | 89 | 24 |
| Instructions given for defendant | 89 | 25 |
| Instructions | 96 | 26 |
| Verdict | 101 | 27 |
| Judgment | 101 | 27 |
| Grounds for new trial | 103 | 27 |
| New trial denied and appeal granted | 104 | 27 |
| Bill of exceptions signed | 104 | 27 |
| Bill of exceptions filed with clerk | 105 | 28 |
| Grounds for new trial | 105 | 28 |
| Affidavit of John Bush | 110 | 29 |
| George Stoll | 116 | 30 |
| J. C. Rogers | 117 | 30 |
| W. D. Nicholas | 118 | 30 |
| Isaac Rumsey | 120 | 31 |
| James Turner, H. M. Ayers, and R. S. Adams | 121 | 31 |
| Court refuses to entertain motion | 122 | 31 |
| Affidavit of Z. F. Smith | 123 | 32 |
| C. S. Scott, J. R. Allen, and J. S. Wasson, as to bill of exceptions | 125 | 32 |
| Certificate of clerk Fayette circuit court | 126 | 33 |
| Certificate of clerk of court of appeals | 127 | 33 |

1 State of Kentucky, court of appeals. September term.

DECEMBER 3, 1881.

JNO. BUSH
*vs.*
COMMONWEALTH. } Fayette.

Ordered that this cause be set for hearing December 8th, 1881.

DECEMBER 7, 1881.

BUSH
*vs.*
COMM'W'TH. } Fayette.

Ordered that this cause be set for December 16.

DECEMBER 16, 1881.

BUSH
*vs.*
COMMONWEALTH.

Ordered that this cause be continued.

JANUARY 6, 1882.

BUSH
*vs.*
COMM'L'TH. } Fayette.

This cause came on and was argued by Att'y-General Hardin for appellee & Z. F. Smith, jr., for appellant, & submitted.

2 January term. April 21, 1882.

JNO. BUSH, APPELLANT,
*vs.*
COMMONWEALTH, APPELLEE. } Fayette.

This court being sufficiently advised it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant her costs herein expended.

Att: T. J. HENRY, *C. C. A.*,
By JAS. MCAULIFFE, *D. C.*

The following is the opinion delivered by the court of appeals on appeal of Bush vs. Comm'w'th, rendered on the 21st day of April, 1882:

3 This is an appeal from a conviction and sentence of death on

an indictment charging murder. On a former appeal from a like sentence the case was reversed because of improper instructions. (78 Kentucky, 268.) On this appeal the complaint is:

First, that the court below had no jurisdiction to try the cause, because it had been transferred to the circuit court of the United States;

4 Second, that the instructions given in the case did not conform to the law as laid down by this court on the former appeal;

Third, that improper testimony was allowed to be considered by the jury; and,

Fourth, that sufficient time was not allowed to intervene between the verdict and the sentence.

Upon the first point it is insisted for appellant that, being a negro, he was deprived of equal civil rights in that the grand jury which returned the indictment against him, and the trial jury which returned the verdict against him, were composed exclusively of white persons, and that persons of his own race and color were excluded from the juries on acconnt of their race and color. It is claimed that a petition embracing these allegations was filed before the final disposition of the case, as required by section 641 of the Revised Statutes of the United States, and that by virtue thereof the jurisdiction to try and determine the case passed to the United States circuit court. The record does not show this to be true. There is an affidavit by appellant that such a petition was filed, but a copy of the petition is not exhibited. An inspection of the petition is essential to determine whether it contained allegations sufficient to authorize a transfer, and in its absence it must be presumed that it was defective in the allegation of jurisdictional facts, and, therefore, that the court below did right to disregard it. It is insisted further that if the record does not show that there was a transfer of the case by the filing of the petition as stated in the affidavit, that the case was transferred by a petition exhibited in the record and which was offered to be filed after the verdict and sentence, and after a motion for a new trial had been overruled. If it be conceded that this petition states facts sufficient to give the Federal court jurisdiction, it is clear that it comes too late. It is provided in the statute that the petition must be filed before "the trial or final hearing of the cause," and a petition filed after verdict and sentence is manifestly too late.

As to the instructions, it is only necessary to say that they sub-

5 stantially conform to the law laid down on the former appeal, and could not have misled the jury from the real issue presented for their consideration.

The objection to certain testimony allowed by the court to go to the jury presents two questions:

First, when a witness is offered to prove what a deceased person testified to on a former trial of the same cause, what is the test, and by whom applied, to determine the question of admissibility of the witness to testify and of the competency of the evidence when heard?

Second, does the want of religious belief incapacitate a witness, and can that belief be inquired into in any way?

Upon the first subdivision the law is that when the witness states, as in this instance, that he remembers the substance of all the deceased witness testified to, both on the direct and on the cross-examination, he is a competent witness, and when the evidence is heard, if it does not clearly appear

that the witness does not remember the substance of all that the deceased person testified to, the evidence should be permitted to go to the jury, but if it be manifest to the court that he does not so remember, the evidence should be rejected. The testimony of each witness who undertakes to detail the evidence of a deceased witness must be tested by the same rule, and if found admissible must stand by itself, and consequently apparent or actual contradictions in the testimony of witnesses who purport to relate the substance of the evidence given by a deceased witness goes not to the admissibility of the testimony, but only to its weight with the jury. Nor is it every incidental or immaterial matter in reference to which the memory of the witness appears to be at fault that will authorize the court to exclude the whole. If the statement appears on its face to cover the substance of what the deceased witness testified to in reference to the material matters in issue the evidence should be allowed to go to the jury for their consideration. Where the witness states that he heard the whole of the testimony of the deceased witness, and that he remembers the substance thereof, the court will not be justified in taking it from the jury unless from the statement of the witness himself it obviously appears that he does not remember the substance of what the deceased witness
6 testified to in reference to the material issues being considered. Applying these tests we see no reason to question the correctness of the rulings of the lower court in admitting the testimony of the two jurors who purport to give the testimony of the deceased witness who testified on the former trial.

The question embracing the second subdivision is novel if not more serious and difficult of determination. The question arises on this state of fact: The commonwealth offered C. C. Moore as a witness, and objection to his being sworn was made by counsel for the accused, who stated that he could prove that Moore was an atheist; did not believe in any God or future state of rewards and punishments, or in any state of accountability hereafter. The objection was overruled by the court, and the witness, being interrogated, stated that he believed it was morally wrong to tell a lie, and that he recognized the obligation of his oath in every sense of the word.

It is admitted that the modern common law requires, as a condition precedent to the admission of the testimony of a witness, that he believe in a Supreme Being who will punish, either here or hereafter, one who swears falsely; that the objection should be made before he is sworn, and that the alleged disbelief should be established by the testimony of such persons as may have heard the proposed witness declare his opinion on these matters, and not by the examination of the witness himself. In the time of Lord Coke it was held that no one but a Christian was a competent witness, but this rule was modified until belief in the existence of a Supreme Being, who will punish false swearing, either in this life or in the life to come, is held sufficient. Now, by statute in England, and in most of the States of the United States, either by statute or by reason of constitutional provisions, religious disbelief does not disqualify. The unquestioned tendency of modern legislation, as well as of judicial interpretation, is to the exclusion of inquiry into religious belief as a test of the competency of a witness. In this State legislation, in civil cases at least has kept pace with this tendency, so that by virtue of the provisions of the

civil code no religious test can be applied. Under that code every person subject to certain exceptions, of which this is not one, is competent
7 to testify, unless he be found by the court incapable of understanding the facts concerning which his testimony is offered, and where the witness is conscientiously opposed to taking an oath, he may affirm. (Secs. 605 and 680 of civil code.) In the criminal code, however, there are no such provisions, and therefore in the administration of the criminal and the penal law the rules of evidence recognized at common law are still in force, unless changed or abrogated by the organic law, as expressed in the constitution. Upon the point under consideration, we are of the opinion that the constitution changes the common law rule and makes competent as witnesses all persons so far as any religious test is concerned. The fifth and sixth sections of the bill of rights, when considered together, seem to cover the exact case under consideration. The fifth section declares the natural and indefeasible right of all men to worship God according to the dictates of their own consciences; that no one shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry; that the rights of conscience shall not be interfered with, and that no preference shall ever be given by law to any religious societies or modes of worship. The object of this provision was to make the divorce between church and state irrevocable, to establish unequivocally that the province of government is to deal with the temporal relations and affairs of men, and in no case with matters spiritual, and that under no circumstances should any burden be placed upon any one, or any penalty enforced on account of opinion in reference to religious or spiritual matters.

The sixth section is as follows:

"That the civil rights, privileges, or capacities of any citizen shall in no wise be diminished or enlarged on account of his religion."

The obvious meaning of this is that whatever civil right, civil privileges, or civil capacities, belong to or are enjoyed by the citizens generally shall not be taken from or denied to any citizen on account of his opinions in regard to religious matters. It is a declaration of an absolute equality which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain a certain
8 opinion in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief. Free governments deal with the acts of the citizen and not with his thoughts. To proscribe or punish for religious or political opinions is of the essence of despotism. To apply the rule insisted upon would be to make a religious test, which is contrary as well to the letter as to the spirit of the constitution. If the test can be applied in this case it may be applied in any, for independent of this provision of the constitution there is nothing to prevent the legislature from passing any law they think proper prescribing a particular denominational standard of belief as a test of competency to give evidence. In that case any Christian denomination, being in the ascendency in the legislature, might pass a law depriving all other Christian denominations of the capacity to testify as witnesses, and on the other hand if it should ever happen that atheists or deists were in a like ascendency in the legislature, there would be nothing to prevent them from prescribing all Christians in the same way. And further, the enforcement of the rule contended for might present, as suggested by Judge Scott in Perry's case, 3 Gratton, a case in which one believing in the prescribed

formula would be sentenced to death by an athiest circuit judge, the sentence and judgment affirmed by an atheist appellate court, and denied pardon by an atheist governor, for in no case is any of the officers required to conform to any belief as a condition precedent to the holding of an office and to the exercise of its functions. If such a case should occur in which a Christian man should suffer death, though innocent, because an atheist was denied the capacity to testify in his behalf, every citizen would denounce such a rule thus applied as absurdly unjust, oppressive, and in violation of the spirit of our institutions. Again, an atheist may testify in any case where property rights are in issue in a civil proceeding, and to deny the commonwealth or the accused of the same testimony where life or liberty is at stake, presents an anomaly that is repugnant to every sense of justice. The opinion in the Perry case above referred to reaches, in construing a similar provision in the Virginia constitution, the conclusion at which we have arrived. We think that this provision of the constitution not only permits persons to testify without regard to religious
9 belief or disbelief, but that it was intended to prevent any inquiry into that belief for the purpose of affecting credibility. It places the atheist in this regard on the same footing as any other witness, and leaves the question as to credibility to be inquired into in the same way.

We are of the opinion that the sentence was not pronounced too soon after the verdict. Verdict was rendered on the 5th day of the term, and on the 7th sentence was pronounced. Sec. 283 of the criminal code provides that sentence in a felony case shall not be pronounced until two days after the verdict is rendered, unless the court be about to adjourn for the term. There appears no reason why the construction applied in ordinary cases, which is to count the day on which the act is done, when the limitation runs from the act as in this case, and not from the day, should not be applied here. Besides, there is nothing to indicate that further delay could in any way have been beneficial to appellant.

Judgment affirmed.

A copy. Attest. T. J. HENRY, *C. C. A.*

10 State of Kentucky. Court of appeals. January term.

JUNE 10, 1882.

JOHN BUSH
*vs.* } Fayette.
COMMONWEALTH.

Came appellant by counsel and filed petition for rehearing herein, and moved to supply record, but the court not being sufficiently advised took time.

JUNE 20, 1882.

BUSH
*vs.* } Fayette.
COMMONWEALTH.

The court being sufficiently advised, it is considered that the petition for rehearing and motion to supply record herein be overruled.

At't. T. J. HENRY, *C. C. A.*,
By JAS. McAULIFFE, *D. C.*

11 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Bush, appellant, and The Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John Bush, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

12

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifteenth day of July, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—

SAM. F. MILLER,
*Associate Justice, Supreme Court U. S.*

(Indorsed:) 1882, July 21. Filed. Att.: T. C. Jones, by Jas. McAuliffe, d. c.

13 The United States of America to the Commonwealth of K'y, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Mnoday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein Jno. Bush is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in

the said writ of error mentioned, should not be corrected, and why speedy justice should should not be done to the parties in that behalf.

Witness the honorable Sam'l F. Miller, associate justice, Supreme Court United States, this 15 day of July, in the year of our Lord one thousand eight hundred and eighty-two.

14 SAM'L F. MILLER,
*Justice Sup. Court U. S.*

On this 24 day of July, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared Richard Armspegir, C. F. C., before me, the subscriber, a notary public for Fayette County, Kentucky, and makes oath that he delivered a true copy of the within citation to W. D. Nichols, sheriff of Fayette County, Kentucky, and to Wm. E. Wilkerson, jailor of Fayette County, Kentucky, this day. Sworn to and subscribed the twenty-fourth day of July, 1882.

D. G. FALCONER,
*Notary Public, Fayette Co., Ky.*

On the 25 day of July, in the year of our Lord 1882, personally appeared H. S. Crutcher, before me, the subscriber, a notary public for Franklin County, Kentucky, and make oath that he delivered a
15 true copy of the within citation to Luke P. Blackburn, governor Kentucky, this day.

HENRY S. CRUCHTER, *C. of C.*

Sworn to and subscribed before me the 25 day of July, 1882.

JNO. W. BOHANNAN,
*Notary Public, Franklin Co., Ky.*

A copy,
Att.: T. J. HENRY, *C. C. A.*

Filed July 25, 1882.

16 *Petition for writ of error to the court of appeals of Kentucky.*

JOHN BUSH
*vs.*
COMMONWEALTH OF KENTUCKY.

To the honorable Sam. F. Miller, associate justice, U. S. Supreme Court:

And now comes John Bush, of Fayette County, Kentucky, by his attorneys, L. P. Tarlton, jr., and Z. F. Smith, jr., and complains that in the record and proceedings, and also in the rendition of the judgment, in a criminal proceeding begun in the Fayette County, Kentucky, circuit court in the name of the Commonwealth of Kentucky, on indictment against John Bush, and continued by appeal between John Bush, appel-
17 lant, and the Commonwealth of Kentucky, appellee, in the court of appeals of the State of Kentucky, being the highest court of law and equity of said State in which a decision could be had in said action, and when a final judgment condemning him to suffer death was rendered against him on the 20th day of June, 1882, in said action, wherein was drawn in question the validity of a statute of and an authority exercised under said State, on the ground of its being repugnant to the Con-

stitution and laws of the United States, and the decision was in favor of such their validity, and wherein further was drawn in question the
18 construction of a clause of the Constitution of the United States, and the statutes thereof, and the decision was against the rights and privileges specially set up and claimed thereunder and in violation of the said John Bush's rights and privileges under the Constitution and laws of the United States, a manifest error has happened, to the great injury and damage of the said John Bush, all of which appears in the record and proceedings had in said actions, a transcript of which is tendered herewith.

Wherefore the said John Bush prays for the allowance of a
19 writ of error to the court of appeals of Kentucky, and for such other process as may cause the same to be corrected in the Supreme Court of the United States, and his protection in life and liberty under the Constitution and laws of the United States.

JOHN BUSH,
By L. P. TARLTON, JR., &
Z. F. SMITH, JR.,
*Attorneys.*

The above is thus endorsed:
Writ of error allowed this 15th day of July, A. D. 1882.
SAM. F. MILLER,
*Justice, Sup. Court.*

1882, July 21. Filed. T. C. Jones, C. C. A.

Be it remembered that heretofore, to wit, on July 15, 1881, the appellant, Jno. Bush, filed in the office of the clerk of the c't of appeals
20 the following transcript, the proceedings had in the Fayette circuit court:

Att. T. J. Henry, C. C. A.

State of Kentucky, Fayette circuit court.

Pleas held before the Hon. B. F. Buckner, judge of said circuit, at the court-house in Lexington, on the 23rd day of May, 1881.

*Parties.*

COMMONWEALTH OF KENTUCKY, PLAINTIFF,
*against*
JOHN BUSH, DEFENDANT.
} On indictment.

*Indictment noted.*

Be it remembered that heretofore, to wit, at a term of said court held on the 19th day of November, 1880, the grand jury, duly empannelled and sworn, returned into court the following indictment against John Bush for murder, endorsed thereon "A true bill."
Said indictment is as follows:

*Indictment.*

Fayette circuit court.

21 THE COMMONWEALTH OF KENTUCKY *against* JOHN BUSH (COLORED). } Indictment. Murder.

The grand jury of Fayette County, in the name and by the authority of the Commonwealth of Kentucky, accuse John Bush of the crime of murder, committed in manner and form as follows, to wit: The said John Bush, on the 15th day of November, 1880, in the said county of Fayette, did, unlawfully, willfully, and with malace aforethought, kill and murder Anna Vanmeter by shooting her with a pistol loaded with powder and leaden balls or other hard substance, against the peace and dignity of the Commonwealth of Kentucky.

C. J. BRONSTON,
*Attorney for the Com'th 10th Dist. K'y.*

22 Said indictment was endorsed as follows, viz:
"A true bill.
"JNO. T. STEVENSON, *Foreman.*"

*Affidavit tendered and refused.*

And afterwards, at a term of said court held for said circuit Dec. 6th, 1880, the Commonwealth came, by her attorney, and defendant appeared in custody.

The defendant tendered and offered to file an affidavit, but the court refused to permit the same to be filed, to which defendant excepts.

The defendant moved the court for a continuance of this case, and filed an affidavit in support thereof, which motion is sustained, and the case is continued to the next term. James Vanmeter, J. C. Van-
23 meter, Amanda Price, David King, and David Harris, witnesses for the Commonwealth, acknowledged themselves bound to the Commonwealth of K'y in the sum of one hundred dollars each for their appearance to testify on the 2nd day of the next February term of this court.

*Special venire.*

And afterwards, at a term of said court held for said circuit February 9th, 1881, ordered that a special venire issue herein, commanding the sheriff of Fayette County to summon one hundred and fifty good and lawful jurors from whom to select a jury for the trial of this case.

*Case continued.*

And afterwards, at a term of said court held for said circuit Feb-
24 ruary 10th, 1881, this case is continued for plaintiff to the next term of this court, and is assigned for trial on the 2nd day of the term, and to have precedence of all other cases at said term.

*Special venire.*

And afterwards, at a term of said court held for said circuit May 16th, 1881, the sheriff is ordered to summon a pannel of seventy-five additional jurors from whom to select a jury for the trial of this case, and in executing this order he will proceed in his selections without regard to race, color, or previous conditions of servitude.

*Motion to aside indictment.*

And afterwards, at a term of said court held for said circuit May
25 18th, 1881, the Commonwealth came, by attorney, and the defendant appeared in custody. The defendant moves the court to set aside the indictment herein against him, because there was a substantial error committed to his prejudice in the selection and formation of the grand jury which found said indictment, in that the said grand jury was selected and formed in violation of the Constitution of the United States, and therefore is unconstitutional, null, and void, because all citizens of the United States and State of K'y, and resident in Fayette County, who were not of the class known as white, though eligible for such service, were excluded from the lists from which said grand jury was selected, and thereby
26 the rights, privileges, and immunities of all such citizens so residing, who did not belong to the class known as white, and of the defendant, who is not white, although a citizen of the United States and of Fayette County, Kentucky, were abridged because he and they are not white, and on account of his and their race and color, contrary to the Constitution of the United States and the laws in such cases made and provided; which was overruled by the court, and defendant excepts.

*Motions overruled.*

And upon the like grounds filed in the formation of the petit jury defendant moved to set aside the pannel of petit jurors, which motion was overruled by the court, and the defendant excepts.

27 Motion filed by defendant is as follows:

*Motion for setting aside jury.*

The defendant now moves the court to set aside the pannel of petit jurors selected and summoned to try him herein, because there was a substantial error committed to his prejudice, in that said jurors were not summoned as required by law, in that all citizens of the United States and State of Kentucky, resident in Fayette County, of the African race, of which there are very many eligible and qualified to serve as jurors in Fayette County, and to which race this defendant belongs, were excluded and not summoned by the officers whose duty it was to select and
28 summon said pannel to serve on said pannel from which the jury to try defendant was to be selected, but only such citizens eligible and qualified which belonged to the class known as white were selected and summoned by such officers. Defendant filed a petition for the transfer of this case to the circuit court of the United States for Kentucky, which motion was overruled, and defendant excepts.

*Trial.*

The defendant plead not guilty, and waived a formal arraignment, and thereupon a jury, viz: Warren Featherston, John Marrs, H. Hellenmeyer,
J. F. Fishback, Wm. Burrier, Evan Hilly, T. J. Montague, John
29 Boyd, G. W. Wainscott, W. S. Bell, Jas. B. Headley, Wm. Wilson,
who were sworn to try the issue. The trial proceeded, and not being finished the jury are adjourned in charge of the sheriff, W. D. Nicholas, and his deputies, Ed. Frazer, J. W. Rodes, and J. W. Rogers, who were sworn in open court, as required by law, until to-morrow morning at nine o'clock, and the prisoner is remanded to the custody of the jailor.

And afterwards, at a term of said court held for said circuit, May 20th, it being the 5th day of May of term, 1881:

The Commonwealth came, by her attorney, and the defendant appeared
in custody. The jury empannelled herein came into court in charge
30 of the sheriff. The argument was concluded, and the jury retired to consult of a verdict, and returned into court with the following verdict, viz:

*Verdict.*

We, the jury, find the defendant guilty of murder, as charged in the indictment, and fix his punishment at death.

JOHN MANS,
*Foreman.*

At the instance of the defendant the jury was polled, and to the question of the judge each and every juror declared the foregoing to be his verdict.

And the prisoner is remanded to the custody of the jailor.

And afterwards, at a term of said court held for said circuit, May 23rd, it being the 7th day of May term, 1881.

*Judgment.*

31 The defendant was this day brought into court, and being informed of the nature of the indictment, plea, and verdict, was asked if he had any legal cause to show why judgment should not be pronounced against him, and none being shown it is adjudged by the court that the defendant be taken to the jail of Fayette County, and there safely kept until the 24th day of June, 1881, on which day, between sunrise and sunset, the sheriff of Fayette County shall hang him by the neck until he is dead. The execution of this judgment shall be inflicted in some inclosure convenient to the said jail, in the presence of not exceeding fifty persons.

32 And afterwards, at a term of said court held for said circuit, May 24th, 1881.

*Motion for new trial overruled.*

Now comes the defendant, by his attorney, and moves the court for a new trial, and files grounds in support thereof, which is noted.

The court, being advised, overrules the motion, and the defendant excepts.

And afterwards, at a term of said court held for said circuit, June 11th, 1881.

*Bill of exceptions tendered.*

The defendant tendered his bill of exceptions herein, which is signed and ordered made part of the record in this case.

*Appeal granted.*

The defendant prayed an appeal from the judgment herein to the court of appeals, which is granted.

*Stay of judgment.*

An', on motion of the defendant, the execution of the judgment
33 herein is ordered to be suspended for the period of sixty days from the date of said judgment.

Bill of exceptions signed & ordered to be made part of the record June 11th, 1881, is as follows:

*Bill of exceptions.*

Be it remembered that at a term of the Fayette circuit court held in November, 1880, it being a regular term of said court, on the sixth day of said term, this cause having been called for trial, the defendant moved to file a motion to dismiss the indictment against him, and offered to file his affidavit with said motion, and the court refused to hear said
34 motion or permit either said motion or affidavit to be filed, whereupon defendant made his bill of exceptions to said ruling, which was signed by the court, and is as follows:

1*st bill of ex.*

Be it remembered that on the sixth day of December, 1880, it being one of the days of a regular term of the Fayette circuit court, the defendant, John Bush, moved the court to permit him to file an affidavit, in words as follows:

*Affidavit as to jurisdiction.*

Fayette circuit court.

COMMONWEALTH OF KENTUCKY, PLAINTIFF,
*vs.*
JOHN BUSH, DEFENDANT. } On indictment.

This defendant, John Bush, says that on the 4th day of February, 1879, a grand jury of Fayette County returned into this court an indict-

35 ment charging him with the same offense, and upon the same statement of facts charged herein, that he, as he had a right to do under the 641st of the Revised Statutes of the United States, filed in this court his petition for a transfer of his case to the U. S. circuit court for the district for trial under said indictment; that the prayer of his petition was granted by said circuit court, which, under said statute, took jurisdiction of this case to the exclusion of this court, in which, under said statute, all further proceedings were to cease forever; that the jurisdiction of said U. S. circuit court, to which, under said statute, this cause was removed
36 for the trial of this offense is superior to and in exclusion of that of this court, and that court having taken jurisdiction this court has no jurisdiction to try the same. He makes the copy of the orders of said U. S. circuit court a part of this affidavit.

JOHN BUSH.

Sworn to and subscribed before me this 6th day of December, 1880.
Att.:

JAMES A. HEADLY, *C. F. C. C.*
B. F. BUCKNER.

37 STATE OF KENTUCKY,
*Fayette Circuit Court:*

Pleas held before the Hon. J. D. Hunt, judge of said circuit, at the court-house in Lexington, on the 24th day of May, 1880.

Be it remembered that heretofore, to wit, on the 4th of February, 1879, at a term of court held for the circuit aforesaid, at the court-house in the city of Lexington, the following orders were had in the case of the Commonwealth of Kentucky against John Bush, viz:

The grand jury, empanelled and sworn for the circuit aforesaid, returned into court an indictment against John Bush, "murder," "a true bill."

Said indictment is as follows:

Fayette circuit court.

38 THE COMMONWEALTH OF KENTUCKY
*against*
JOHN BUSH.

The grand jury of Fayette County, in the name and by the authority of the Commonwealth of Kentucky, accuse John Bush of the crime of murder, committed as follows, viz:

The said John Bush, on the 4th day of February, 1879, in the county aforesaid, did feloniously, willfully, and with malice aforesaid, aforethought, kill and murder Annie Vanmeter by shooting her with a pistol loaded with a leaden bullet, or other hard substance, against the peace and dignity of the Commonwealth of Kentucky.

J. M. ADAMS,
*Commonwealth Att'y.*

Witnesses: James Vanmeter, Mary Bush (col.), Fannie Van-
39 meter, Amanda Price (col.), Dr. Coleman, Willis Price, Dr. Bennett.

Said indictment is endorsed: "A true bill.

"S. BASSETT, *Foreman.*"

And on May 29th, 1879, the Commonwealth came, by her attorney, and the defendant appeared in custody. The jury came into court in charge of the sheriff. The trial progressed and being finished and the arguments of counsel concluded, the jury retired to consult, and returned into court the following verdict, viz:

"We the jury find the defendant, John Bush, guilty of murder in the first degree and fix his punishment at death by hanging.

"CHARLES C. MOORE, *Foreman.*"

And the defendant is remanded to jail.

40 And on June 14th, 1880:

The defendant was this day brought into court, and being informed of the nature of the indictment, plea, and verdict, was asked if he had any legal cause to show why judgment should not be pronounced against him, and none being shown—

"It is adjudged that the defendant be taken to the jail of Fayette County, and there safely kept until the 22nd day of August, 1879, on which day, between sunrise and sunset, the sheriff of Fayette County, shall hang him by the neck until he is dead."

Circuit court of the United States, district of Kentucky.

MONDAY, *October 4th*, 1880.

COMMONWEALTH OF KENTUCKY }
*vs.* }
JOHN BUSH. }

41 This day came the defendant, by L. P. Tarlton, jr., his attorney, and filed copies of the proceedings of the Fayette circuit court in this case.

And on Tuesday, October 5th, 1880, came the defendant, by A. E. Willson, his attorney, and moved the court for a writ of habeas corpus. It is ordered that said motion be set for hearing on the 7th inst.

And on Friday, October 8th, 1880, the court being now fully advised of the motion of the defendant, John Bush, for a writ of habeas corpus herein, it seems to the court the law is for the defendant; it is therefore ordered that the clerk do issue the appropriate writ of habeas corpus cum causa herein, returnable on the 6th inst.

42 And on Thursday, October 14th, 1880, it is ordered that the time for the return of the writ of habeas corpus herein be, and the same is hereby, extended until the 19th inst.

And on Tuesday, October 19th, 1880, came Wm. E. Wilkerson, jailer of Fayette County, Kentucky, and filed his response to the writ of habeas corpus cum causa herein; came also the defendant, John Bush, in custody of the marshal; thereupon the defendant, by L. P. Tarlton, jr., his attorney, announced himself ready for trial, and moved the court that it do now proceed to the trial of this case, and the court being fully advised of said motion, it was ordered that said motion be, and the same is hereby,
43 overruled. The court being also advised as to the jailer's response to the writ of habeas corpus herein, it is considered by the court that said response is insufficient.

And it appearing to the court from the transcript of the record heretofore filed that the indictment herein was found by a grand jury summoned under and in accordance with the provisions of section 1, chapter 62, general statutes of Kentucky, which excludes all other than white citizens from being summoned, or serving thereon, the court is of opinion that said law is a violation of the 14th amendment to the Constitution of the United States, and orders said indictment quashed.

44 The marshal of the court is ordered to return the said John Bush to Lexington, Ky., as speedily as possible, and there release him. He will, however, before setting him at liberty notify the Commonwealth's attorney, or, in his absence, the county attorney, or, in his absence, the county judge. This notice shall be in writing, stating the time and place of his release, and he will report his action to this court.

The defendant excepts to so much of this order as requires his return to Lexington, Kentucky.

A copy. Attest:

Witness my hand and seal of the circuit court of the United States for the 6th circuit and district of Kentucky, this 26th day of November, 1881.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

45 At a regular term of the Fayette circuit court, held in May, 1881, the cause having been called, and a jury having been empannelled and sworn, and defendant pleading not guilty to the indictment, and the attorney for the Commonwealth having stated the law and the facts he expected to prove to the jury.

The Commonwealth then introduced the following witnesses:

*Vanmeter, Jas.*

First. JAMES VANMETER, who being first duly sworn, testified as follows:

I was the father of deceased, Anna Vanmeter. On the 13th day of January, 1879, that being county court day, I went to Lexington,
46 Ky., and returning reached my home, which is in Fayette County, about five miles from the city, on the old Frankfort road, about four or five o'clock in the afternoon. After my return I went to work to fix a sleigh in the back yard near the porch, and called John Bush there to help me. Bush and his wife were living with and working for me. While at work on the sleigh I said to him that my wife had heard Mary

Witnesses: James Vanmeter, Mary Bush (col.), Fannie Van-
39 meter, Amanda Price (col.), Dr. Coleman, Willis Price, Dr. Bennett.

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46 Ky., and returning reached my home, which is in Fayette County, about five miles from the city, on the old Frankfort road, about four or five o'clock in the afternoon. After my return I went to work to fix a sleigh in the back yard near the porch, and called John Bush there to help me. Bush and his wife were living with and working for me. While at work on the sleigh I said to him that my wife had heard Mary

Bush, his wife, telling lies on her, and that he (John) must stop it. He denied it, and we went into the sitting-room of the house, where my wife and children were, to settle it; when we got there Bush turned to
47 my wife and said, "and you said so and so," and then turning to the little children he said the same to them, and then turning to Anna he said the same to her, and upon her denying it he said to my daughter, "It is a damned lie." I struck him lightly on the cheek with a drawing-knife which I had in my hand, and ordered him out of the house and off the place. I then went to work on the sleigh. I don't know where he went. In a short time my little daughter ran to me and said John had a pistol on the other side of the house and was trying to shoot ma.

(Defendant objected to the witness stating anything that was told him by his little child, which objection was overruled, to which defendant then excepted.)

I went into the house and got my shot-gun, which usually stays
48 on a rack in the room in which I had gone with Bush a short time before, but some person, I don't know who, had set it in the corner of the dining-room. I got the gun and went around the corner of the house, where the cistern is. Before I reached the corner of the house I heard a pistol go off. I was not in sight then. I went a short distance around the corner and hollowed to my wife and daughter to get out of the way. Bush, when he saw me, ran off towards a tree 25 or 30 yards to the right of my daughter. Shooting one load from the gun, I went back the same way I came out and got my pistol, and when I came out Bush was gone, and I learned for the first time my
49 daughter was shot. She said, "Come here, pa; I am shot, and shot badly." I went to her and helped her to the house. Don't know who loaded the gun; but a day or two afterwards I drew the load from the other barrel, and it was loaded with No. 5 small shot. When I reached the corner of the house, just before I fired, I saw Bush facing me and the house. My wife was on his left side, and Annie was between Bush and the house with her little baby brother in her arms, and, I think, rather to the right, about ten steps from him, facing Bush. Dr. Bennett was the first physician who saw Annie. He saw her the same
50 evening. She was shot on Monday, and died the following Saturday. Dr. Coleman saw her on the following day. Both he and Dr. Bennett pronounced the wound not dangerous. She was shot in the thigh of the right leg, the bullet entering on the right side and passing through the fleshy part of the thigh in front of the bone, came out on the opposite or inside of the leg, ranging downwards.

My other little daughter died of scarlet fever on the Monday following the Saturday on which Annie died. Two other of my children had scarlet fever at that time. There had been none in my family. (Wit-
51 ness produced some bird shot which he said came from the other barrel of the gun, and which he extracted several days after he had fired the first barrel at Bush. The gun had been in his keeping in the house after the shot at Bush until the shot were drawn from the unshot barrel, and defendant objected to the shot being offered in evidence or witness testifying in regard to the same, which objection was overruled, to which defendant excepted.) The little girls who died of scarlet fever

occupied the same bed after she was taken sick with Annie (or a short time, a part of one day—that was the day before Annie died. My
52 wife, Fannie Vanmeter, who testified at the former trials of this case, is now dead. It was about 70 yards from the corner of the house around which I came to where my wife and daughter and Bush were standing. Up to the shooting Bush had always been on friendly terms with my daughter, who was friendly with everybody.

*C. C. Moore.*

The plaintiff then introduced C. C. MOORE, who was called to prove the testimony of Mrs. Fannie Vanmeter, which was given at the former trial of the cause, she having died since that trial.

(Defendant objected to the witness being sworn or testifying, because he was an atheist, and did not believe in any God or future state of
53 rewards and punishments or in any state of accountability hereafter, and defendant avowed that if permitted, he would prove such to be witness' belief, or want of belief; which objections the court overruled, to which defendant then excepted.)

Witness, upon being interrogated, did state that he believed that it was morally wrong to tell a lie; he recognized the obligations of his oath in every sense of the word. He also stated that he recollected the substance of Mrs. Vanmeter's evidence, both on the direct and cross-examination, and that she was sworn & testified as witness in this case on former trial.

The witness being sworn, testified as follows:

54 I was foreman of the jury before which defendant was tried, and which returned a verdict at a former term of this court, and heard Mrs. Vanmeter testify, and remember now the substance of her testimony. She stated that Mr. Vanmeter and Bush came into the room where she and her daughter and little children were sitting, and Bush said to each of the little children, "And you said so and so," and then turning to Miss Annie he said the same to her. She denied it, and Bush said to Annie, "It is a damned lie." Mr. Vanmeter struck him on the chin with his drawing-knife, and told him to leave the place; and he went out. Then went out in the
55 yard and met Bush at the gate with his pistol in his hand. I told him to go back, and he said he had come to settle this fuss or settle some body. She said that she said to Bush, "You are mad, now; go back and wait until you get over your passion, and then we can talk over the matter." Bush then said, "I will not go back; I intend to settle this fuss or settle somebody." I was standing near him. He then raised his pistol and pointed it out from him. I looked around and saw my daughter Annie, and saw that his pistol was pointed toward her. I told her to go
56 to the house Annie was standing between Bush and the house. She had her little baby brother in her arms. I thought Bush was going to shoot Annie, and after telling her to go to the house I said to Bush, "Don't shoot." He said, "I will de damned if I don't shoot;" and then fired, with his hand still pointed towards Annie. I tried to catch the pistol, but barely touched it with my fingers. Almost immediately after Bush fired Annie said, "I am shot;" and I ran to her. Mr. Vanmeter came around the house with his gun in his hand. He hollowed to me to

get out of the way, and fired. When he shot Bush was running
57 towards a tree in the lot, and was 15 or 20 yards out of a line between Mr. Vanmeter and Annie. When he, Bush, shot Annie said, "I am shot." Mr. Vanmeter then went back in the house, and then came back, and helped Annie into the house.

Cross-examined:

Mrs. Vanmeter went out of the family room the same way Bush did. I believe Mrs. Vanmeter said Mary Bush was in the family room while John and Mr. Vanmeter were there. I am not certain. I cannot recall whether she said Annie said she was shot before or after Mr. Vanmeter shot, but remember it was stated by Mrs. Vanmeter that Annie said
58 she was shot. She said she had extended her hand to seize the pistol when Bush shot, and that the ball from the pistol grazed her little finger; she said she was touching the pistol when it was discharged; she also said that the point where Annie was was at an angle of about 45° from a straight line between Bush and herself and Mr. Vanmeter. Mrs. Vanmeter said she was wounded in the hand by the discharge of the pistol, but she had a glove on it, and I did not see it.

(Defendant moved to exclude all the testimony of this witness because he had not told the substance of the whole of Mrs. Vanmeter's
59 testimony on her direct as well as cross-examination. Motion overruled, and defendant excepted.)

*Luther Darnaby.*

Plaintiff then introduced LUTHER DARNABY to prove the testimony of Mrs. Vanmeter.

I was a member of the jury at a former trial of this cause, and heard the testimony of Mrs. Vanmeter.

(Defendant objected to Mr. Darnaby testifying, and excepted to the court allowing him to testify.)

Mrs. Fannie Vanmeter was sworn as a witness on that trial, and I remember the substance of her testimony, both on the direct and cross-examination. She said that she was in the room when Mr. Vanme-
60 ter and Bush came in; that Bush turned to each of the children and said, "And you said" so and so, and then turning to Miss Annie he said the same to her; she denied it, and he said "You are a damned liar." Mr. Vanmeter struck him on the cheek with his drawing knife, and ordered him to leave the place, and he went out of the room. I told Bush that he was mad then, and that when he got in a good humor we could talk it all over. I went out of the house, and met Bush at the yard gate; had a pistol in his hand; I told him to go back, and he said he had come there to settle that fuss or settle somebody. I took hold of the pistol and
61 told him not to shoot, and he said he would shoot, and shot. I noticed that Bush raised his pistol and pointed towards somebody behind me. I looked around and saw Annie behind me; I, thinking Bush was going to shoot her; told her to go to the house, and then reaching my hand towards Bush's pistol, asked him not to shoot. He said, "I'll be damned if I don't shoot, and there with his hand still extending toward Annie, fired. Mr. Vanmeter was not then in sight. As soon as Bush fired, Annie said "I am shot." I was standing by Bush, facing the way Mr. Vanmeter

came. Annie was a little distance off, and was facing Bush, and was
62 standing between Bush and the house. After the pistol went off Mr. Vanmeter came around the house with his gun in his hand, and shouted to us to get out of the way, and fired. When he fired, Bush was running towards and was 15 or 20 yards out of a line between Annie and her father. He got behind a tree and raised his pistol, and Mr. Vanmeter went back to the house. Annie had her little baby brother in her arms, Mr. Vanmeter helped Annie to the house after she was shot, and as Bush ran towards the tree I saw the blood on her shoe, and said to Bush, "You rascal, you have shot Annie." I touched the end of
63 Bush's pistol as it went off and got my hand wounded. (Darnaby stated that she showed the hand with the scar of the wound to the jury.) I do not remember who were the other men who served on the jury with me, nor do I remember all the witnesses. I am not positive whether Mrs. Vanmeter said that Bush said to Annie, "You are a damned liar," or "It is a damned lie," but I think it was, "You are a damned liar;" do not remember whether she said Mary Bush was in the room at that time or not.

(Defendant moved the court to exclude the testimony of this
64 witness, because he had not stated the substance of the whole of Mrs. Vanmeter's testimony on her direct and cross-examination; motion overruled and defendant excepted.)

*Thornton Vanmeter.*

Plaintiff there introduced THORNTON VANMETER, who, being sworn testified as follows:

I was not present when the shooting was done, and know nothing about it. I loaded the gun which father (Mr. Vanmeter) shot that evening a few days before with bird shot No. 5. It was not shot from the time I loaded it until father shot it. This is the first time I have ever testified in this case. I am the son of James Vanmeter, and was the brother
65 of deceased, Annie Vanmeter. I did not have possession of the gun all the time from the time I loaded it until father shot it off, but it was in the house, and I know no one else had used it. I saw the load taken out a day or two after sister was shot, and the other barrel was loaded with the same sort of small shot.

*Amanda Price.*

Plaintiff then introduced AMANDA PRICE, who, being sworn, testified as follows:

I was in the cabin the day Miss Annie Vanmeter was shot—when John Bush came for his pistol. His wife, who was there, asked him what he was going to do, and he said, "Follow me and see." This was
66 all that was said, and he got his pistol; he went out and went towards the house. His wife and myself followed him. When he got just within the yard gate he was met by Mrs. Vanmeter, and Miss Annie was just behind her mother. Mrs. Vanmeter told him to go back, for she had or would pacify Mr. Vanmeter; he said he would not do it; he was going to settle that fuss or settle somebody. Mrs. Vanmeter took

hold of him, and told him not to shoot, and he said he would be damned if he didn't shoot, and shot; he had the pistol in his right hand. Miss Annie was a little distance off when the pistol was discharged, be-
67 tween Bush and the house, and facing Bush, with her back towards the house. I did not see Mr. Vanmeter until the pistol went off; he came around the corner and shot at Bush, who was running towards a tree; did not know whether the pistol was a self-cocking one or not; had never heard of Miss Annie and Bush having a difficulty, or of her having any unkind feelings towards him, or he towards her. She also testified that when Mrs. Vanmeter met Bush at the gate, she said, "John, you are mad now, and you know what a fool you are when you are mad; go back; wait until you get in a good humor, and then we can talk it all over." He then said, "No; I am going to settle this fuss or settle
68 somebody." Bush then pointed his pistol towards Miss Annie Vanmeter, who was behind her mother, with the baby in her arms, and Mrs. Vanmeter looked around and saw Miss Annie, told her to go to the house, and, trying to catch Bush's pistol, said "Don't shoot." Bush then said, "I'll be damned if I don't shoot," and fired. Mr. Vanmeter was not then in sight. As soon as Bush fired Miss Annie exclaimed, "I am shot!" and Mrs. Vanmeter, running to her, said to Bush, "You rascal, you have shot Annie." About that time Mr. Vanmeter came around the corner of the house with his gun, and Bush ran off to a tree 15 or 20
69 yards to the right of Miss Annie, and Mr. Vanmeter fired at Bush.

*Dr. Bennett.*

The plaintiff then introduced Dr. BENNETT, who, being sworn, testified as follows:

I saw Miss Annie the same evening she was shot. The ball struck her on the outside, on right side of her right thigh, and passed through the fleshy part of the thigh. No bones were broken or arteries or blood vessels of importance were cut. I regarded it as a simple and not necessarily dangerous gun-shot wound. I put a simple cold-water bandage or dressing loosely on the wound. I did not see her again. I found her sys-
70 tem in a very unhealthy condition, and prescribed for that condition by giving a purgative. I regard scarlet fever as an infectious disease. It may be carried in the clothing for some time. A wounded person is much more liable to it than unwounded. A person can carry the disease when in the desquamating stage. When I left the girl I regarded the wound as a simple one, and one from which I would expect her to soon recover. It is easy for a physician to tell whether a person dies from blood poison or scarlet fever, and it was possible without the intervention of any other disease for blood poison to have set in, and Miss Vanmeter died on Saturday from the wound alone.

71 *Dr. Coleman.*

Plaintiff then introduced Dr. COLEMAN, who, being sworn, testified as follows:

I went to see Annie Vanmeter on the day after she was shot. I found

her system somewhat out of order. She was wounded in the right thigh. (Witness described wound as Dr. Bennett did.) I did not consider it a dangerous wound. When I saw her the next day there was more fever and restlessness, and the wound was inflamed and not doing well. She had no sore throat. She died on Saturday. Dr. Skillman was called in on Friday. She died from blood poison produced by the wound,
72 and by the wound alone. She died from the effects of the wound alone, and nothing else. He proved he had scarlet fever about six weeks before, and had been out attending his patients for five or six weeks before he saw Annie. I had a slight attack of scarlatina five or six weeks before. I laid down only one day. I consulted Dr. Skillman as to the propriety of visiting patients before I did so. I had been visiting my patients regularly for about three weeks before I was called to visit Miss Vanmeter. On cross-examination witness was asked if he was not
73 at the time he visited Miss Vanmeter desquamating from scarlet fever. Witness said at that time his hands were pealing a little, but he attributed it to a liniment of turpentine and other medicines recommended to him by Dr. Skillman for a rheumatic trouble. When I first visited Miss Vanmeter, I was called into another room to see a little sister of hers, and prescribe for her. When I went the next time, she was lying on the bed with Miss Annie. This little girl died with scarlet fever, after that visit, and on the Monday after; Annie Vanmeter died on the Saturday following the Monday she was shot.

On the former trials I testified that my hands were desquamat-
74 ing. I did not put any of the liniment on my feet; but they were desquamating at the time I made my first visit to Miss Annie, and I dressed the wound. I did not say on a former trial that I had refused to go a few days before because of the scarlet fever. He said he was not desquamating from scarlet fever, and had not been for more than five weeks before. He was satisfied Annie did not have scarlet fever.

*Dr. Skillman.*

Plaintiff then introduced Dr. H. M. SKILLMAN, who, being sworn, testified as follows:

I have been a practicing physician in Lexington for thirty-four years. I went to see Annie Vanmeter on the Friday after she
75 was shot. She had a coated tongue, high fever, and low delirium. I regarded her then as in a dying condition. She was dying of septicemia or blood poisoning, and did die on the next day. I saw no symptoms of scarlet fever. A wound of this kind can produce septicemia from itself in from two to six days. My opinion is that she did not die from scarlet fever, but from septicemia produced by the wound itself. After septicemia sets in it may cause death after twenty-four hours. Scarlet fever is a very contagious . The witness stated that she did die from the effects of the wound, and from that alone; that she did
76 not have scarlet fever. He saw her on Friday, and on the day she died, Saturday. Witness said he had not the slightest doubt that she died from pyemia or blood poisoning resulting from the wound. It was a typical and unmistakable case of pyemia, having the well-known symptoms and characteristics of that disease.

*Dr. Scott.*

Plaintiff then introduced Dr. M. T. SCOTT, who, being sworn, testified as follows:

I have been a practicing physician for about three years. I consider scarlet fever an infectious disease. Persons may have it and never show any symptoms of it. I saw Miss Vanmeter with Dr. Skillman
77 on Friday morning; thought she had septicemia produced by the wound itself, and am positive, in my professional judgment, that she died from the effects of the wound, and from that alone, without the intervention of any other disease or cause.

Plaintiff then closed, and defendant introduced the following witnesses to maintain the issue on his part:

*Mary Bush.*

The defendant then introduced MARY BUSH, who, being duly sworn, testified as follows:

I am the wife of John Bush; I was never married to him, but we have been living together as man and wife for a great many years. I
78 was in the cabin with Amanda Price on the evening of the day when Miss Annie Vanmeter was shot. When Bush came in he got his pistol, and we asked him what he was going to do; after he had gone a short distance from the house he said. "Follow me and see;" we followed him; I was ahead of Amanda Price. When he reached the gate and got into the yard he was met by Mrs. Vanmeter and Miss Annie; Mrs. Vanmeter asked him to go back, and he said, "Miss Fannie, didn't Mr. Jim draw his gun on me in the house," and she said, "Yes, John, I know he did, but I have got him quieted down." This was all that was said.
79 I was standing just inside the gate; Mrs. Vanmeter was standing to John's left, with her hand on his arm. Miss Annie was standing just in front of him, and facing him with her back to the house, with her little brother in her arms. Mr. Vanmeter came around the corner before John's pistol went off; he was in sight then; he shouted to his wife to get out of the way, and fired; as soon as his gun went off I heard Miss Annie say, first, "Ma, Jimmie shot," and then say, "Ma, I am shot." John ran as soon as Mr. Vanmeter shot to get behind a tree. Mr. Vanmeter went into the house as soon as he shot. I did not see any-
80 thing of John until I saw him in jail here. I saw the pistol John had; it was a self-cocker, or one that was cocked and fired by pressing the trigger.

Cross-examined:

I have had a baby by another man since my husband was put in jail.

*Dr. J. W. Scott.*

The defendant then introduced Dr. J. W. SCOTT, who, being sworn, testified as follows:

I saw Miss Vanmeter on the Thursday before she died; the wound was in a very unhealthy condition. I could not say that the unhealthy con-

dition was produced by any other cause than the wound and the condition of her system. I only saw her once and did not make any exami-
81 nation as a physician, because I quit practice many years ago; I was merely present as a friend of the family and noticed her casually.

*Dr. Dudley.*

The defendant then introduced Dr. B. W. DUDLEY, who, being sworn, testified as follows, to wit:

I have been a practicing physician since before the war, during the war in the army, and since in New York City and this city. I have had considerable experience in treating gunshot wounds as a surgeon in the Confederate army and in hospital, and in my general practice. I have heard the wound described by the physicians who saw it, while they were on the stand.

82 Wounded persons are much more liable to scarlet fever than other'. A patient can have scarlet fever and show none of the symtoms of it, and this often happens. An ordinarily healthy person with a gunshot wound cannot contract septicæmia from the wound itself in forty-eight hours. I never knew or heard of such a case. It could so appear within four or five days, at least. If it did appear within that time I would attribute it to some other cause than the wound itself, and scarlet fever would be such a cause. Scarlet fever makes its appearance in from two to ten days. I could say that the wound described would not
83 have produced septicæmia and killed in the time it did without some intervening cause; contact with scarlet fever, in my opinion, might be such intervening cause. I did not see Miss Vanmeter, and could not say what caused her death, but would rely on what the attending physician should say.

*Dr. Allen.*

The defendant then introduced Dr. A. S. ALLEN, who, being sworn, testified as follows:

I have been a practicing physician for nearly forty years.

It is simply impossible for an ordinary gunshot wound in a healthy person to cause, of its own accord, septicæmia, or blood-poisoning,
84 in forty-eight hours. It cannot be. Both my experience and all the authorities of my profession are against it. Wounded persons are much more liable to scarlet fever than others, and wounded persons and aged persons frequently have scarlet fever and show no symptoms of the disease. I never knew a wound to cause septicæmia, and death to result, in the same length of time as in this case. This was a simple wound, and if death resulted in so short a time I would immediately attribute it to some other cause than the wound itself. And scarlet fever might be the cause of the septicæmia in this case. Lying-in women fre-
85 quently*ly* have septicæmia when they are attended by a person from a scarlet-fever patient. I never saw or heard of a case where death resulted in twenty-four hours after septicæmia set in. I did not see Miss Vanmeter, and cannot say what caused her death.

*Dr. Bryan.*

Defendant then introduced Dr. JOSEPH T. BRYAN, who, being sworn, testified as follows:

I have had a good deal of experience in treating gunshot wounds in hospitals and in my general practice. I have heard the wound on Miss Vanmeter described; I would not expect such a wound to be a serious
86 one. I know of no case where septicæmia has set in from the wound itself in forty-eight hours, and I know of no authority or experience for such a wound to generate septicæmia of itself within six days. It is a disputed point in the profession whether scarlet fever, if it intervened, could cause the septicæmia. Scarlet fever can make its appearance in two days after incubation, and very often the patient dies without showing any symptoms of scarlet fever. If septicæmia had appeared on the sixth day she could have died in twenty-four hours thereafter. The attending physician could easily distinguish septicæmia from scarlet fever.

*Dr. Sweeny.*

87 The defend. then introduced Dr. W. O. SWEENY, who, being sworn, testified as follows:

I have been a practicing physician for over 15 years, and have had a large experience in treating scarlet fever. It usually makes its appearance in from two to ten days, and is more rapid in wounded persons. It frequently kills without showing any symptoms. Scarlet fever gets the system in such a condition that septicæmia may take effect. If there is nothing to cause it prematurely, as scarlet fever, septicæmia may set in on the sixth day, and death result about five days after. He also testified that scarlet fever could not be communicated through the wound to
88 the person wounded; that in order to effect a wound at all the germ of scarlet fever must first be developed in the throat or mucus membrane, and could develop nowhere else, and then afterwards it might effect the wound, but the attending physician could easily distinguish whether the patient died from septicæmia produced by the wound or from the effect of scarlet fever in the wound.

*J. W. Wallis.*

The defendant then introduced J. W. WALLIS, who, being sworn, testifies as follows:

I heard the testimony at a former trial of this case. Dr. Coleman stated on the stand that when he went to see Miss Vanmeter his
89 hands and feet were desquamating from scarlet fever, with which he had been confined to his bed for some time, a short time before. And that he had refused only a few days before going to see Miss Vanmeter to go to the family because he was still desquamating.

*Dr. Coleman recalled.*

Dr. COLEMAN then recalled, and denied making any such statement.

The defendant, having closed his testimony and the plaintiff saying noth-

ing further, moved the court to give the following instructions, which were given after court had changed somewhat; to which changes defendant excepted.

Said instructions are as follows:

*Instructions given for defendant.*

90 1st. The jury are instructed that they should acquit the defendant of any offense, unless they believe, from the evidence, beyond a reasonable doubt, that the defendant inflicted the wound on Annie Vanmeter.

2nd. The jury should acquit the defendant of murder, unless they believe, from the evidence, beyond a reasonable doubt, that he inflicted the wound intentionally, and with an unlawful, felonious, and malicious intent to take human life, or inflict great bodily harm on some human being, and that her death was the result of the wound and not of scarlet fever or other disease not resulting from the wound.

91 3rd. Malice in its legal sense means the intentional doing of a wrongful act (not in the heat of passion aroused by sufficient provication), which might reasonably be expected to result in the death of or the infliction of great bodily harm upon some human being.

4th. The jury should acquit the defendant of murder unless they believe, from the evidence, beyond a reasonable doubt, that the death of the deceased would have resulted from the wound inflicted by the defendant without the intervention of another disease or contagion contracted by or to which deceased was exposed after the infliction of the wound; but

92 they may find him guilty of maliciously and willfully shooting and wounding, or of shooting and wounding in sud'en heat and passion, if they believe he intentionally fired the shot which inflicted the wound, or of careless and reckless use of fire-arms if they believe the shot was unintentional.

*4th.* If the jury believe from the evidence that the death of the deceased was caused partly by diseases or causes not the result of the defendant's acts they should acquit the defendant, unless they believe, beyond a reasonable doubt, that such wound would have necessarily proved fatal without such intervening causes.

93 5th. If the jury believe from the evidence that the shot which inflicted the wound on Miss Annie Vanmeter was fired by the defendant, and if they believe, further, that if at the time he fired said shot he did so to protect himself from great bodily harm then threatening him, or which he had reasonable grounds to believe were threatening him, at the hands of any person, and such shooting was the only way he could protect himself from death or great bodily harm, the jury should acquit him on the grounds of self-defense.

A. If the jury believe from the evidence that Annie Vanmeter died from the effects of a wound caused by the discharge of a pistol in

94 the hands of defendant, but shall further believe that when said pistol was fired it was done without any intention to fire it on the part of defendant, they should find him not guilty of murder or voluntary manslaughter, unless they shall further believe that at the time said pistol was fired defendant was handling it in such reckless and careless manner as to necessarily endanger the lives of persons around him, in which event they should find him guilty of voluntary manslaughter.

B. If the jury believe from the evidence that the defendant, in a sudden affray, and not in self-defense, without previous malice, shot and
95 wounded Anna Vanmeter with a pistol or other instrument, loaded with a ball or other hard substance, of which shooting and wounding she did not die, they should find him guilty of shooting in sudden heat and passion, and fix his punishment at a fine of not less than fifty nor more than five hundred dollars, or at confinement in county jail of not less than six months nor more than one year, or both, in the discretion of the jury.

C. If the jury should believe from the evidence that the defendant wilfully and maliciously shot, with an intention to kill, Annie Van-
96 meter, so that she did not die thereby, with a gun or other instrument loaded with a leaden bullet or other substance, they shall find the defendant guilty of wilfully and maliciously shooting and wounding with intention to kill, and fix his punishment at confinement in penitentiary not less than one, nor more than five years.

*Court's instruction.*

The court then, on its own motion, gave the jury the following instructions.

Said instructions are as follows:

1. If the jury believe from the evidence that the defendant in this county, before the finding of the indictment, wilfully, intentionally,
97 and maliciously, and not in self-defense, shot and wounded Annie Vanmeter with a pistol, and that said Annie di'd in consequence of said shooting, or from any diseased condition of the body resulting from said wound, they should find him guilty of murder and fix his punishment in the penitentiary for life, in their discretion.

2. If the jury, however, believe from the evidence that the defendant in this county, and before the finding of the indictment, not in self-defense, but in sudden heat and passion, without malice, shot and wounded Anna Vanmeter with a pistol, and that said Annie died from said shoot-
98 ing, or from any diseased condition of the body resulting from said wound, they should find him guilty of voluntary manslaughter, and fix his punishment at imprisonment in the penitentiary for not less than two nor more than twenty-one years.

3. If, however, the jury believe from the evidence that the defendant in this county, before the finding of the indictment, *that* Annie Vanmeter, and that said Annie died from said wound or from a diseased condition of the body resulting from said wound, and further find that the defend-
ant shot said Annie at a time when he had no intention to take her
99 life, or that of any other person, but that he shot her at a time when he had a pistol in his hand in anticipation of an affray with James Vanmeter, then the jury should find him guilty of involuntary manslaughter, and fix his punishment at fine and imprisonment, one or both, in the discretion of the jury.

4. If the jury believe from the evidence that Annie Vanmeter died of scarlet fever, or from the effects of scarlet fever communicated to her by one of the attending physicians, or by any other person, they should acquit him of murder and of manslaughter.

5. Unless defendant is proved guilty beyond every reasonable

doubt the jury should acquit him. If they find the defendant guilty, but have a reasonable doubt whether he is guilty of murder or of voluntary manslaughter they should find him guilty of voluntary manslaughter; and if they find him guilty of manslaughter, but have a reasonable doubt whether he is guilty of voluntary or involuntary manslaughter, they should find him guilty of involuntary manslaughter.

To each and all of said instructions defendant then excepted.

After argument by counsel the jury retired and returned into court the following verdict. Said verdict is as follows:

*Verdict.*

We, the jury, find the defendant guilty of murder as charged in the indictment, and fix his punishment at death.

JOHN MARRS,
*Foreman.*

And upon defendant's motion the court polled the jury. The said verdict was returned on the 5th day of the term of said court, and afterwards, on the 7th day of said term, the court pronounced judgment on defendant as follows:

The defendant was this day brought into court, and being informed of the nature of the indictment, plea, and verdict, was asked if he had any legal cause to show why judgment should not be pronounced against him, and none being shown it is adjudged by the court that the defendant be taken to the jail of Fayette County, and there safely kept until the 24th day of June, 1881, on which day, between sunrise and sunset, the sheriff of Fayette County shall hang him by the neck until he is dead. The execution of this judgment shall be inflicted in some inclosure convenient to the said jail, in the presence of not exceeding 50 persons.

And afterwards, on the 8th day of said term, defendant moved the court for a new trial, and filed grounds therefor.

*Grounds for new trial.*

Said grounds for a new trial are as follows:

The defendant files the following grounds in support of his motion herein for a new trial of the above-styled action, and moves the court to grant him a new trial therein.

The defendant moves the court for a new trial of the above-styled cause, and files the following as his grounds therefor:

1. Because the court uninstructed the jury and refused to properly instruct them.

2. Because the verdict was against the law and the evidence.

3. Because he did not receive a fair and impartial trial, because the jury were influenced by passion and prejudice in making this verdict.

T. P. TARLTON, JR.

The court overruled, without hearing argument, said motion, and defendant prayed an appeal to the court of appeals, which is granted.

And now this defendant produced this his bill of the several exceptions by him taken in manner and at the time above set forth, and prays that the same be allowed, signed, and made part of the record, which is done accordingly this 11th day of June, 1881.

B. T. BUCKNER.

Be it further remembered that on June 9th, 1881, that there was
105 filed in the clerk's office of said court the following bill of exceptions, which is in words and figures to wit:

*Bill of exceptions filed with clerk.*

Be it remembered that on the nineteenth day of the May term, 1881, of this court, being the sixth day of June, 1881, the defendant, John Bush, moved the court to grant him a new trial herein, and offered to file grounds therefor additional to those theretofore filed. Said grounds were as follows:

*Grounds for new trial.*

1. Because on the trial his substantial rights were prejudiced in that the court refused to quash the indictment herein, on defendant's motion made, because from the said grand jury which found the indictment
106 all citizens of the United States and State of Kentucky, and all residence of Fayette County belonging to the African race, to which this defendant belongs, and which race composes nearly one-half of the population of said Fayette County, were excluded by the officers whose duty it was to select and summon said jurors from service on said jury because of their race and color, although they were otherwise eligible for such service, and in violation of his rights as a citizen under the Constitution and laws of the United States.

2. Because the defendant has not received a fair and impartial trial
107 in that from the list of petit jurors summoned from which the jury to try this cause was selected, after the examination of ninety-three persons so summoned as jurors, and the exhaustion of all defendant's p'remptory challenges, all members of the African race who are citizens of the United States and State of Kentucky and resident in Fayette County, Kentucky, of which race this defendant is a member, composing about one-half of the population of Fayette County, were excluded by the officers whose duty it was to select and summon such jurors, from service
108 on said jury because of their race and color, although otherwise eligible for such service, without authority derived from the constitution and laws of the State of Kentucky, or from the orders of this court, and in violation of his rights as a citizen under the Constitution and laws of the United States; and that he, this defendant, did not know that no persons of the African race had been summoned to serve on said jury until after the trial had commenced, and until all of the said ninety-three jurors, all of whom were white, from which said jury was formed, had been examined and all defendant's p*reem*'tory challenges had been exhausted.

109 3. Because the court erred in overrul*l*ing defendant's petition to transfer this cause to the circuit court of the United States for the district of Kentucky.

4. Because Thomas Montague, who was one of the jury which tried said case, had expressed an opinion before the trial was commenced, and had said that if he was accepted as a juror that he would find defendant guilty of murder, and fix his punishment at death ; and that this defendant did not hear of this until after the trial.

5. Because the following persons, John Marrs, James B. Headly, Thos. J. Montague, John Boyd, Warren Featherston, Victor Hillen-
110 meyer, Evan Lilly, G. W. Wainscott, who were members of the jury before which defendant was tried, had formed and expressed an opinion that defendant was guilty of the crime charged in the indictment, and that he did not learn of this until after the trial.

Defendant files herewith affidavits in support of the above grounds for a new trial, marked A, B, C, D, E, & F.

*Def't's affidavit.*

Exhibit A is as follows:

The affiant, the defendant, John Bush, says that he belongs to the African race, and to that class of citizens of the United Statess and of the State of Kentucky, resident in Fayette County,
111 known as colored citizens; that nearly one-half of the citizen, resident in said county possessing the necessary qualifications and eligible for service on the grand and petit juries for said State and county belong to said race and to the class known as colored citizens; that nevertheless, although they number so many, and are fully eligible and qualified, yet not one of them has ever been placed on the lists or summoned to serve on any jury, grand or petit, in this court, but all such citizens have been excluded from selection for such service because of their race and
112 color by the officers whose duty it was to furnish such lists and summon such jurors. He says further that the grand jury which found the indictment herein against him was not selected as required by law, but that in its selection all citizens of the United States and of the State of Kentucky resident in Fayette County belonging to the African race, and eligible and qualified for service upon said grand jury, were excluded from the lists from which said jury were to be selected by the officers making said lists because of the race and color of said citizens The affiant says further that after the commencement of his trial there were summoned
113 and examined ninety-three persons, from which number the jury which tried him and returned the verdict against him was selected after he had been forced to exhaust all of the challenges allowed him by law; that all of the said ninety-three persons summoned and examined belonged to that class of citizens known as white citizens, and not one of them belonged to the same race of this defendant, and no member of his race was ever summoned or presented as a juror to try him, although, as heretofore said, there were so many eligible and qualified for such service, but all such were excluded by the officers whose duty it was
114 to summon said jurors because of their race and color; that with a grand jury so formed and a trial jury so selected, this defendant did not have a fair and impartial trial, with the due process of law, nor did he have in such trial the equal protection of the law guaranteed to him,

with every other citizen, by the Constitution and laws of the United States and of this State.

This affiant says, further, that since his trial he has learned that one member of the jury which convicted him, viz, Thos. J. Montague, was not a competent, fair, or impartial juryman, for he had said on the
115 very morning when he was taken as such juryman, in the presence of divers persons, that it would not do to place him on the Bush jury, for he would hang him; he had made his mind up, and the nigger ought to have been hung long before, or words to that effect; and further, that many of the jurors who tried him had not only formed opinions as to defendant's guilt or innocence, but had expressed them averse to him. The statements of this affidavit defendant is prepared to support by the affidavits of others filed herewith, and with oral proof, if demanded.

JOHN BUSH.

116 Sworn to before me by John Bush, this 2nd day of June, 1881.

A. K. WOOLLEY,
*Examiner for Fayette Co., Kentucky.*

*Affidavit of Geo. Stoll.*

Exhibit B is as follows:

The affiant, George Stoll, said that he was supervisor of the United States sensus for 1880 in and for the district which included the county of Fayette, State of Kentucky, and that the population of said county was 29,080, of which number, to the best of his recollection, about three-sevenths belong to the African or colored race.

GEORGE STOLL,
*Late Supervisor, &c.*

Subscribed and sworn to before me by George Stoll this second day of June, 1881.

CHAS. H. STOLL,
*Notary Public, Fayette County, Kentucky.*

117 Exhibit C is as follows:

The affiant, J. C. Rogers, says he is a deputy sheriff of Fayette County, Kentucky, and that he was present in the court-room at the trial of the above-styled action at the May term, 1881, of the Fayette circuit court; that there were ninety-three persons summoned to serve as jurors in said case examined before the jury was selected which tried the case, and which was not completed until defendant had exhausted all of the twenty challenges allowed him by law; that all of the ninety-three persons so presented and examined belong to that class of persons known as
118 white citizens, and that no citizen of Fayette belonging to the class known as colored of African were presented for examination to serve on said jury.

J. C. ROGERS.

Subscribed and sworn to before me this 2nd day of June, 1881.

Z. F. SMITH, JR.,
*Examiner, Fayette Co.*

*W. D. Nicholas.*

Exhibit D is as follows:

W. D. Nicholas says he is now sheriff of Fayette County, and has been since January, 1879, and that there was the name of no citizen of Fayette of the African race on the list furnished him by the jury commissioners of Fayette County from which he summoned the grand jury which
119 found the indictment in the above-styled action at the November term, 1880, of the Fayette circuit court, nor upon the list so furnished him for the regular panel of petit jurors for the May term, 1881, of said court, at which term defendant was tried on said indictment. He says further that the assessor's books of Fayette County, Kentucky, show that there are in said county 4,358 white male citizens over the age of twenty-one years, and 3,396 negro or colored male citizens in said county over the age of twenty-one years.

W. D. NICHOLAS, *S. F. C.*

Subscribed and sworn to before me this 2nd day of June, 1881.
120 Z. F. SMITH, JR.,
*Examiner, Fayette Co.*

Exhibit C is as follows:

The affiant, Isaac Rumsey, says that on the morning of the day of the May, 1881, term of the Fayette circuit court on which Thomas Montague was selected as a juror in the above-styled case, he heard the said Montague say, in the presence of this affiant and others, at affiant's shop on Short street, in Lexington, Kentucky, that "from what he had heard of the Bush case he had made up his mind, and would hang him" (Bush), or words to that effect.

ISAAC RUMSEY.

121 Subscribed and sworn to before me this 3rd day of June, 1881.
L. P. TARLTON, JR.,
*Notary Public, Fayette Co., Ky.*

*Turner, Ayres, & Adams.*

Exhibit F is as follows:

The affiants, James Turner, H. M. Ayres and R. S. Adams say that they are citizens of the United States and of the State of Kentucky, and are, and have long been, residents and citizens of Fayette County. That a large portion of the citizens of said county belong to the African race who are eligible and qualified to serve on the grand and petit juro*r*s in said county, and that none of said citizens have ever been summoned in said county to serve on any of said juro*r*s.

JAMES TURNER.
122 H. M. AYRES.
R. S. ADAMS.

Subscribed and sworn to by the above-named persons, before me, this 5th day of June, 1881.

L. P. TARLTON, JR.,
*Notary Public, Fayette Co., Ky.*

*Court refuses to entertain motion.*

Which motion the court refused to entertain or to allow to be entered of record; to which ruling the defendant then excepted, and asked for his bill of exceptions, which the court refused.

The defendant then moved the court to set aside the order herein overruling defendant's motion for a new trial and the judgmen therein, and that he be allowed to file the grounds for a new trial, with
123 accompanying affidavits, marked "A," "B," "C," "D," "E," & "F," respectively, which are tendered herewith in support of this motion. He files the affidavit of Z. F. Smith, jr., and offers other proof.

*Affidavit of Z. F. Smith.*

Affidavit of Z. F. SMITH, is as follows:

The affiant, Z. F. Smith, jr., states that he is one of the counsel for the defendant herein; that the verdict of the jury at the trial of the above-styled case, at this term of this court was returned into court on the 5th day of its present term; that the court pronounced judgment on the seventh day of the term; that defendant filed his motion for a new trial
124 with grounds therefor on the 8th day of the term and that the same was overruled when neither this affiant or the defendant were present and without this affiant's knowledge at the time, and that when said motion was made and overruled Mr. L. P. Tarlton, jr., who was the only other counsel for defendant, was absent from Fayette County.

Z. F. SMITH, JR.

Sworn to and subscribed before me by Z. F. Smith, this 6th day of June, 1881.

WATTS PARKER,
*Examiner, Fayette County, Ky.*

Which motion the court refused to entertain or to allow to go on
125 the record, to which ruling the defendant then excepted and asked for a bill of exceptions, which the court refused. Thereupon the defendant presented this his bill of exceptions, which the judge refused to sign.

C. S. SCOTT.
J. R. ALLEN.
J. S. WASSON.

*Affidavits of bystanders, Scott, Allen, & Wasson.*

STATE OF KENTUCKY,
*County of Fayette:*

The affiants say that they are attorneys at law, and were present when all the facts set out in the foregoing bill of exceptions (which they have this day signed) occurred in the Fayette circuit court, and they believe that all the facts as set out therein are true.

C. S. SCOTT.
J. R. ALLEN.
J. S. WASSON.

126 Sworn to and subscribed before me by C. S. Scott, J. R. Allen, and J. S. Wasson, this 9th day of June, 1881.

JAMES A. HEADLEY,
*C. F. C. C.*

STATE OF KENTUCKY,
*Fayette Circuit Court:*

I, James A. Headley, clerk of the said court, certify that the foregoing sixty-five pages contain a full, true, and complete copy of the record in the case mentioned in the caption as the same now remains of record in my office.

In witness whereof I hereunto sign my name this 11th day of July, 1881.

Att.:

JAMES A. HEADLY,
*C. F. C. C.*

127 COMMONWEALTH OF KENTUCKY:

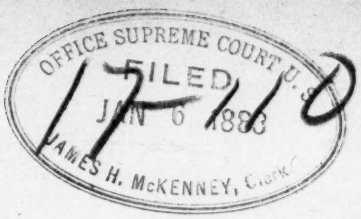
I, Thomas J. Henry, clerk of the court of appeals for the State of Kentucky, do certify that the foregoing and annexed one hundred and nineteen pages contain a true and complete transcript of the record of the cause therein set forth of John Bush, appellant, against The Commonwealth of Kentucky, appellee, including the writ of error from the Supreme Court of the United States, & the citation thereunder, as is on file in my office.

Witness my hand and seal of office, at office in the city of Frankfort, this fifth day of October, 1882, and in the 91st year of the Commonwealth of Kentucky.

[SEAL.]

THOMAS J. HENRY, *Clerk.*

(Indorsement on cover:) No. 1130. John Bush, plaintiff in error, vs. The Commonwealth of Kentucky. Kentucky c't of appeals. Filed 31st October, 1882.




17110

# Supreme Court of the United States.

*JOHN BUSH,* *Plaintiff in Error.*

*Vs.* } **Brief for Plaintiff in Error.**

***THE COM'WEALTH OF KENTUCKY,*** *Defendant in Error.*

Transylvania Printing Company, Lexington.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

JOHN BUSH, Plaintiff in Error.

*vs.* { Brief for Plaintiff in Error.

COM'WEALTH OF KENTUCKY, Defendant in Error.

MAY IT PLEASE THE COURT:

The want of a proper arrangement, amounting almost to confusion, in the record in this case, is to be regretted, and necessitates a more tedious statement of its main facts than is desirable. At the same time we think this Court will, in reading it, appreciate the difficulties that had to be surmounted where new questions were involved and new practice required, before a court which not only declined to entertain defendant's motions, certainly legitimate in themselves, but refused either to allow them to go on the record or to give a bill of exceptions, when such refusal was excepted to, thereby compelling him to appeal to bystanders for that which the court had, we think, arbitrarily refused.

We shall attempt to make our statement of this case—of the questions involved—and of the manner in which they were raised, as brief as possible, but in order to make it clear it will be necessary to give some facts in its history which do not appear plainly in the record alone

## STATEMENT OF THE CASE.

The Plaintiff in Error, a day laborer belonging to the African race, not having the means himself, or the friends to supply them, necessary to prepare his defense or to employ counsel to do so, was indicted (Rec. p. 13.) by the grand jury of the Circuit Court of Fayette County, Kentucky, on the 4th of February, 1879, for murder in killing, by shooting her, Annie

Vanmeter, the little daughter of a white man, his employer, with whom he was engaged in a difficulty at the time. In February, 1879, he was brought to trial before the Fayette Circuit Court, by which we were appointed counsel to conduct his defense. This trial resulted in a hung jury. He was again tried by the same court in June, 1879, convicted and sentenced to be hung (p. 14). This judgment was, upon an appeal taken to the Court of Appeals of Kentucky, reversed by that court, and the case remanded for trial *de novo* (78 Ky. 268); for said that court in its opinion: "It is proper in this connection to state "that the evidence was such as to justify the jury in finding that "the wound inflicted by the shot was neither necessarily nor "probably mortal, and that death ensued not from the wound "but from scarlet fever negligently communicated by the at- "tending physician. * * * * * * In the case under "consideration the fever was not the natural consequence of "the wound nor was it produced by any necessity created by "the infliction of the wound. It did not render it necessary to "have the wound treated by a physician just recovering from "the scarlet fever, even if it be conceded that medical treat- "ment was necessary at all. If the death was not connected "with the wound in the regular chain of cause and conse- "quences, there ought not to be any responsibility. If a new "and wholly independent instrumentality interposed and pro- "duced death it cannot be said that the wound was the natural "or proximate cause of the death. This view of the law was "not so presented to the jury as to give the appellant its full "benefit." (Bush vs. Com'th, 78th Ky. 270.)

Upon the return of the case to the Fayette Circuit Court it was again, on the 24th day of May, 1880, (p. 13) called for trial, when the defendant filed his petition praying that the case should be transferred to the U. S. Circuit Court for the District of Kentucky, as provided by Sec. 641 of the U. S. Rev. Statutes, because the grand jury which found the indictment (p 13) against him was formed in accordance with the requirements of Sec. 1, Art. 1, Chap. 62, of the General Statutes of Kentucky, which was in violation of the Constitution of the United States, &c., in that it provided that "No person shall be qualified to "serve as a grand juryman unless he be a white citizen," &c.,

&c, Thus excluding all citizens that did not belong to the class known as "white," because of their race and color. The case was then continued, to await the action of said U. S. Circuit Court upon this petition. The defendant then by his attorney filed copies of the proceedings had in the Fayette Circuit Court in the said U. S. Circuit Court on the first day of its next term, October 4th, 1880, (Rec. p. 14) which court decided "that the "law was for the defendant" in his petition for a transfer of his case to that court, issued its writ of habeas corpus and took the defendant from the custody of the officers of the State of Kentucky and placed him in that of its own officer. That court then overruled defendant's motion that he be tried, and of its own motion quashed the indictment which had been returned February 4th, 1879, and ordered the discharge of the defendant (p. 15), after he should have been carried nearly an hundred miles, at Lexington, Fayette County, Kentucky, where he was rearrested by the State officials, and again indicted for the same offense by the grand jury of the same court on the 19th day of November 1880

That grand jury which then indicted him, was selected at the preceeding regular term of that court in May, 1880, by jury commissioners appointed by the court at that term, as required by the statutes of Kentucky.

On December the 20th, 1880, the case having been called for trial, the defendant offered to file his affidavit and plea to the jurisdiction of that court to try him (p. 9), which the court refused to permit, and defendant excepted (pp. 12, 13, 14, 15). The case was then continued from term to term until the 18th of May, 1881, when it was again called for trial under the indictment found November 19th, 1880, when, before the trial was begun, the defendant, having theretofore plead the want of jurisdiction of the court to try him, moved the court to set aside the indictment (p. 10), which was overruled and exceptions taken. He then filed his verified petition for a transfer of the case to the U. S. Circuit Court, which was also overruled and exceptions taken. The trial was then had and a verdict of guilty returned by the jury on the 20th day of May, the 5th day of the term. Upon this verdict the judgment here complained of was pronounced by the court on the 23d day of

May, sentencing the defendant to be hung on the 24th of June—*just thirty-one days thereafter.* On the day after the judgment was pronounced, being the *8th day of the term,* the defendant's counsel made a motion for a new trial and filed some grounds, which the Court overruled, without hearing argument (p. 27), in the absence of the defendant and of both of his counsel (see Smith's affidavit, p. 32). Afterwards, on the *19th day* of the same term the defendant moved the court for a new trial and offered to file additional grounds supported by proof (p. 28, 29 &c.) which the court refused to entertain or to allow to go on the record, to which ruling the defendant excepted and asked for a bill of exceptions, which the court refused (p. 32). The defendant then moved the court to set aside its order overruling the motion filed on the 8th day of the term, that he might be allowed to file these additional grounds for a new trial with the affidavits, which the court refused to entertain or allow to go on the record, to which ruling the defendant excepted, and asked for a bill of exceptions, which the court refused. The defendant then presented his bill of exceptions, containing all the proceedings had in the case on said 19th day of the term, which were presented to the judge and he having refused to sign it, it was duly signed and verified by three members of the bar then present (p. 32). The case was then taken upon said bills of exceptions by appeal to the Court of Appeals, which affirmed the judgment of the Fayette Circuit Court (p. 1), and is now before this Court upon Writ of Error.

## ASSIGNMENT OF ERRORS.

It is relied upon by the plaintiff that in this case the Fayette Circuit Court erred;

*First.*—By refusing to entertain his plea to its jurisdiction to try him for the offense charged in the indictment and its failure therefor to dismiss the prosecution for the want of jurisdiction.

*Second.*—By overruling his motion to quash the indictment because the grand jury which found it was selected and formed in violation of the Constitution of the United States, in that the officers of the State acting by authority of the laws of Kentucky,

which were unconstitutional, discriminated in selecting the members of said grand jury among the citizens of the United States and of the State of Kentucky, because of their race and color.

*Third.*—By denying the prayer of his petition for a transfer of his case to the United States Circuit Court for the District of Kentucky, and proceeding further in the trial of it after his petition for such transfer had been filed.

*Fourth.*—By not allowing him to make his motion for a new trial and file grounds therefor, with proof to sustain them, on the 19th day of the May Term, 1881.

*Fifth.*—By denying him on the 19th day of the May Term, 1881, a hearing in court that he might ask that an order made in his case at that term should be set aside, and by refusing to hear any of his motions made upon that day, and

*Sixth.*—That the officers of the State of Kentucky, who were charged with the selection of the petit jurors which were to try him, unlawfully discriminated in doing so, by only selecting for such jurors from among the citizens of Fayette County eligible and qualified for such service, those which belonged to the class known as white, and failed and refused to select any others because of their race and color, which was the same as plaintiff's, so that by this unlawful action and discrimination of said officers he was forced to stand his trial in said court before a jury summoned in violation of his rights under the Constitution of the United States and the laws of Congress made for the enforcement thereof.

## ARGUMENT.

### I.

The question raised by the first error assigned by plaintiff in error is that the Fayette Circuit Court had not jurisdiction to try him for the offense charged in the indictment, because the jurisdiction of that "criminal proceeding" had been transferred by proper legal procedure from that court to the U. S. Circuit Court for the District of Kentucky.

In the argument of this question we can say without discussion, that the plea of this want of jurisdiction was properly raised by the verified petition or affidavit (Rec. p. 12) of the plaintiff in error.

That the statement of facts in that affidavit, not being denied, would, even if unsupported, be taken as true for the consideration of this question, based upon them.

That these facts are fully sustained by the record of the proceedings in the U. S. Circuit Court for the 6th District which was made part of that affidavit (Rec, pp. 13, 14, 15).

That the facts shown by the affidavit and that record were, that on the 4th day of February, 1879, the grand jury of Fayette County returned into the Fayette Circuit Court an indictment (Rec, p. 13), charging this plaintiff in error upon the same allegation of facts with the same offense with which he was charged in the indictment (Rec. p. 9), to which he was then called upon to plead; that that case, a "criminal prosecution " commenced in a State court," had been, under the provisions of the 641–2 Sections of the U. S. Revised Statutes transferred to the U. S. Circuit Court for the 6th District, which took thereby jurisdiction of it and ordered its proceedings thereafter as required by law and the statutes provided.

And here we would say, that, while entertaining the greatest respect for the opinions of the Court of Appeals of Kentucky, that its decision in this case, upon this error, is shown by its opinion (Rec. p. 2) to be so evidently the result of a confusion of the proceedings had on the first indictment with those on the second as to deprive it of the weight which otherwise would attach to it. Its opinion that, upon a question of the effect of the removal of a case from a State court to a United States Court, the record of said United States Court which showed that the case had been removed there from a State court, is not sufficient proof of such removal and that an inspection of the petition asking such removal was necessary, certainly cannot be sustained. The unbroken current of the decisions is that it is for the court to which the case is removed to decide upon the sufficiency of the petition asking the removal (Ins. Co., vs. Dunn, 19 Wall, 214). But the decision of that question was not called for in this case, for here it is not denied or questioned but that the case was removed to the U. S. Circuit Court.

We have left then for discussion the naked question whether or not the proceedings had under the first indictment against the plaintiff in error forever divested the Fayette Circuit Court of

its jurisdiction in a criminal proceeding to punish him for the same offense charged in that indictment. That it was, is, we think, demanded by the rights of the citizen as well as sustained by the language of the Statute and the decisions of this Court.

An inspection of the two indictments shows conclusively that they were both the commencement of the same criminal prosecution—to punish the same person—for the same offense in the same court.

This criminal prosecution was, under the 641 Sec. U. S. Rev. Statutes, removed from the Fayette Circuit Court, where it was commenced, to the United States Circuit Court for the 6th District. By this removal the United States Circuit Court acquired what the State court lost—the jurisdiction of the case (19 Wall, 214; 16 Pet. 97; 103 U. S. 490). Now this jurisdiction thus acquired by that court was not concurrent with, but exclusive of that of the State court, and it thereby became the only legal forum for the final disposition of the cause, and this " by virtue of Section 641 of the Revised Statutes, which enacts " that upon the filing of such petition all further proceedings in " the State court shall cease and shall not be resumed except as " thereinafter provided" (100 U. S. 317). But that statute goes further and prescribes that after the removal of the case to the U. S. Circuit Court that court shall proceed to a final disposition of the case "in the same manner as if brought there by " original process."

If a State commences in its court proceedings to punish a citizen, upon a charge of an offense committed even against its peace and dignity, by laws and agencies which are in violation of his rights under the Constitution and laws of the United States, and he, seeking to be tried upon such charge where he will be protected from the operation of such unconstitutional laws and agencies, has the case properly and legally removed from the State to a United States court, and the State then abandons its charge and refuses to prosecute it there, it cannot complain, whatever becomes of that prosecution. The State, having failed and refused to pursue its prosecution where the " paramount law of the land " declares it shall be done, cannot resume that prosecution elsewhere. To allow it to do so would

make the statute any thing but remedial, or secure to the citizen any thing but a speedy trial. If the State can again arrest the citizen and begin the criminal proceeding against him in the same court, only to be again removed to the United States court, it would make the constitutional guarantee of security in person and liberty a mockery. If it could be done once, it could be done as long as the citizen's life lasted and the State refused to change its unconstitutional laws and remove its unconstitutional agencies. But certainly such could not have been the intention of Congress when it enacted the statute.

That intention, it seems to us conclusively, was that by the removal the State court lost, unless the petitioner failed to pursue his rights under it, which was not done in this case, what the United States court acquired—the jurisdiction ever afterward to order its proceedings to a final disposition, and the State court cannot thereafter any more inquire what that final disposition was, or how reached, than it could as to whether the legislative power which enacted the removing statute had therein prescribed the manner and mode of procedure in the trial of the cause after it had been removed, and this, said this Court in *Tennessee vs. Davis*, "is totally immaterial to the inquiry "whether the case is removable" or not.

So in the later case of *Kern vs. Huidekoper* (103 U. S. 485), this Court said that "no provision of the State law, no peculiar- "ity in the nature of the litigation which would forbid the "United States Court from entertaining original jurisdiction "could prevent the removal, provided the case fell within the "terms of the statute for the removal of causes." Even stronger still is this language of the court in the same case: "When the prerequisites for removal have been performed the "paramount law of the land says that the case shall be removed: "and the case and the *res* both go to the Federal court * * "* and when the removal is accomplished the State court "is left without any case, authority or process by which it can "retain possession of the *res*. The suit and the subject matter "of the suit are both transferred to the Federal court by the "same act of removal." And this is applicable to criminal as well as to civil cases, as was said in *Davis vs. Tennessee* (100 U. S. 264): "Both are equally within the domain of the judicial

" powers of the United States, and there is nothing in the grant " to justify an assertion that whatever power may be exerted " over a civil case may not be exerted as fully over a criminal " one, and a case arising under the Constitution and laws of the " United States may as well arise in a criminal prosecution as " in a civil suit."

That the jurisdiction acquired by the United States Circuit Court by the removal of this prosecution was exclusive, and for the final disposition of the charge against the defendant was so clearly decided in the above case of *Davis vs. Tennessee* (100 U. S. 257), as to render any argument unnecessary. There this Court said, in construing the 643 Sec. U. S. Revised Statutes, which in all respects, except in the class of persons to be relieved by it, is similar to the 641 Section: "The imaginary diffi- " culties and incongruities supposed to be in the way of *trying* " in the Circuit Court one indicted for an alleged offense against " the peace and dignity of a State, if they were real would be " for the consideration of Congress. But they are unreal. " While it is true there is neither in Section 643, nor in the act " of which it is a re-enactment, any mode of procedure in the " trial of a removed case prescribed, except that it is ordered " to proceed as a cause originally commenced in that court, yet " the mode of trial is sufficiently obvious. *The circuit courts of* " *the United States have all the appliances needed for the trial of* " *any criminal case*. They adopt and apply the laws of the State " in civil cases and there is no more difficulty in administering " the State's criminal law. They are not foreign courts. The " Constitution has made them courts within the States to ad- " minister the laws of the States in certain cases; and so long " as they keep within the jurisdiction assigned to them, their " general powers are adequate to the trial of any case. The " supposed anomaly of prosecuting offenders against the peace " and dignity of a State in tribunals of the general government, " grows entirely out of the division of powers between that " government and the government of a State; that is, a division " of sovereignty over certain matters. When this is under- " stood (and it is time it should be), it will not appear strange " that even in cases of criminal prosecutions for alleged offenses " against a State, in which arises a defense under United States

" law, the general government should take cognizance of the " case and try it in its own courts according to its own forms of " proceeding."

Our construction of the effect of the removal is sustained also by this court in *Strauder vs. West, Virginia* (100 U. S. 311), where it says: "So in *United States vs. Reese* (92 U. S. 214), it " it was said by the Chief Justice of this court, 'Rights and im- " 'munities created by or dependent upon the Constitution of " 'the United States can be protected by Congress. The form " 'and manner of the protection may be such as Congress in the " 'legitimate exercise of its legislative discretion shall provide. " 'These may be varied to meet the necessities of the particular " 'right to be protected.' But there is express authority to " protect the rights and immunities referred to in the Fourteenth " Amendment, and to enforce observance of them by appropri- " ate congressional legislation. And one very efficient and " appropriate mode of extending such protection, and securing " to the party the enjoyment of the right or immunity, is a " law providing for the removal of his case from a State court, " in which the right is denied by the State law, into a Federal " court, where it will be upheld. This is an ordiuary mode of " protecting rights and immunities conferred by the Federal " Constitution and laws."

So again this Court said, in *Rives vs. Virginia* (100 U. S. 318), in speaking of the power of Congress to enforce the prohibitions of the Fourteenth Amendment, whenever they were disregarded by any department of the State government: "The " mode of enforcement is left to its discretion. It may " secure the right, that is, enforce its recognition, by removing " the case from a State court, in which it is denied, into a Fed- " eral court, where it will be acknowledged. Of this there can " be no reasonable doubt. Removal of cases from State courts " into courts of the United States has been an acknowledged " mode of protecting rights ever since the foundation of the " government. Its constitutionality has never been seriously " doubted."

What protection was acquired, or the enjoyment of what right was secured by this plaintiff when, according to the law of Congress, he had his case transferred in October, 1880, to the

U. S. Circuit Court from the State court? Was it not to have his cause "*removed for trial,*" and "proceed therein in the same " manner as if it had been brought there by original process" in that court, where his rights under the Constitution and laws of the Unitcd States would be upheld instead of in the court where they were denied? Was it not to have that court "*take cogni-* " *zance of the case aud try it according to its own forms of proceed-* " *ing?*" Any other construction would, it seems to us, make of the mode, prescribed by Congress in the 641st Section U. S. Revised Statutes, for protecting rights under the Fourteenth Amendment, a juggling judicial farce.

Or why authorize a defendant in a criminal proseeution commenced in a State court—who is denied or cannot enforce in the judicial tribunals of the State a right secured to him by the laws of the United States—to seek protection for these rights in a United States court which "has all the appliances necessary " in any criminal case?" If, after the United States court has acquired and taken jurisdiction, of that prosecution the State can again prosecute him upon the same charge, under its same unconstitutional laws, enforced through its same unconstitutional agencies, as we thall show has been done in this case once at least. And if it can be done once why not as often as he can have the transfer made under the same Section. Certainly Congress in enacting that Section intended to give the defendant, who availed himself of its protection, immunity from prosecution for this same offense under such laws and through such agencies of the State, *and this immnnity was to be made perpetual* by having the prosecution after the removal to the U. S. Court proceed there—as if brought by original process—to a final judgment. It surely did not intend that his liberty, aye, his life itself should be made a shuttlecock to be tossed back and forth between the two jurisdictions until his life should reach its natural end, or until, what in some cases might be more remote, the State should change its laws. We would say that that statute was passed to secure protection from *unequal laws which had been enacted,* and not to use the liberty of the citizen as a lever *to force the State to change those laws.*

Congress in that Statute simply said to the States. If in a criminal prosecution commenced by you in your court against a

citizen you deny him, by your laws, protection in the rights secured to him by the Constitution and laws of the United States, we then authorize and empower him as herein provided to have that prosecution transferred for the trial of that issue between you and him, which in this case was the guilt or innocence of this plaintiff, from the jurisdiction of your court, where it has been commenced, to that of the court of the United States, where his rights will be recognized and upheld, and where it must be concluded the same as if it had been orignally commenced there.

There is no analogy between this case under disscussion and one where the prosecution is dismissed to be resumed *in the same jurisdiction.* For, while we do not say that this prosecution cannot be pursued in the jurisdiction where it was properly and legally transferred and abondoned, we do claim it cannot be resumed in that jurisdiction where it is forbidden by the "paramount law of the land,"---the statute itself.

It follows as a necessary conclusion then that the plea denying that the Fayette Circuit Court had jurisdiction to try this plaintiff under the indictment found November 19th 1880 was good and should have prevailed.

II.

The second error assigned is the refusal of the Fayette Circuit Court to quash the indictment found against this plaintiff on the 19th of November, 1880.

In the motion (Rec. p. 10), this plaintiff asked the court to set aside that indictment "because there was a substantial error " committed to his prejudice in the selection and formation of " the grand jury which found said indictment, in that the said " grand jury was selectcd and formed in violation of the Con- " stitution and laws of the United States and therefore is un- " constitutional, null, and void, because all citizens of the United " States and State of Kentucky, and resident in Fayette county, " who were not of the class known as white, though eligible for " such service, were excluded from the lists from which said " grand jury was selected, and thereby the rights, privileges, " and immunities of all such citizens so residing who did not be- " long to the class known as white, and of the defendant who

" is not white, although a citizen of the United States and of " Fayette county, Kentucky, were abridged because he and they " are not white, and on account of his and their race and color, " contrary to the Constitution of the United States and the laws " in such cases made and provided."

This motion, which the court denied, and to which ruling an exception was taken, was made before the final hearing of the case, and certainly raises such a question under the Constitution and laws of the United States as to bring it under the jurisdiction of this Court for review, (*Davis vs. Tennessee*, 100 U. 5, 257, *Ex Parte Virginia*, id. 339). Nor will it require any argument, if it can be brought to the judicial notice of this Court that all the citizens of the United States and of the State of Kentucky resident in Fayette county, who did not belong to the class known as "white," were excluded by the State of Kentucky, acting through either its Legislative, its Executive or its Judicial Department, from the grand jury which found the indictment—to show that such exclusion denied the plaintiff in error, who does not belong to that class known as "white," the "equal protection of the laws," and that the trial and conviction under that indictment deprived him of his liberty, as the execution of this judgment upon that conviction will take away his life without "due process of law," in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and the laws of Congress adopted for their enforcement. That such exclusion is in violation of that amendment is too well settled by the decisions of this Court to be questioned now. *Strauder vs. West Virginia* (100 U. S. 303), *Virginia vs. Rives* (*id.* 303), *Ex parte Virginia* (*id.* 339), *Neal vs. Delaware* (103 U. S. 370).

Said the Court in *Strauder vs. West Virginia* (100 U. S. 308): " The very fact that colored people are singled out and ex- " pressly denied by a statute all right to participate in the ad- " ministration of the law as jurors, because of their color, though " they are citizens and may be in other respects fully qualified, " is practically a brand upon them approved by the law, an as- " sertion of their inferiority, and a stimulant to that race preju- " dice which is an *impediment to securing to individuals of the* " *race* that equal justice which the law aims to secure to all

" others." So in the same case this Court asks, "And how " can it be maintained, that compelling a colored man to submit " to a trial for his life by a jury drawn from a panel from which " the State has expressly excluded every man of his race, be- " cause of his color alone, however well qualified in other re- " spects, is not a denial to him of equal legal protection? These views are affirmed by the later decision of *Neal vs. Delaware*, where this Court says (103 U. S. 394), "A denial upon their " part of his right to a selection of *grand and petit* jurors with- " out discrimination against his race, because of their race, would " be a violation of the Constitution and laws of the United " States which *the trial court was bound to redress.* As said by " us in *Virginia vs. Rives supra*, 'The Court will correct the " 'wrong, will quash the indictment or the panel; or if not the " 'error will be corrected in a supreme court,' *and ultimately in this court* upon review.

The exclusion of all members of the race to which plaintiff belongs from the grand jury which indicted him was *made by the laws of Kentucky*, and the officers of the court which selected that grand jury in obedience to those laws *at the time the selection was made.*

This Court takes judicial notice of the laws of a State (104 U. S. 562) and so much of the law of Kentucky at the time this grand jury was selected as we deem necessary for the decision of this question is printed in an Appendix as being most convenient for reference.

Nor will the proposition be questioned that all officers of a State are presumed to follow and obey the law of the State as it stands on its Statute books—*until it is repealed or, in some cases, declared unconstitutional by its Supreme Court.*

As said by this Court in *Virginia vs. Rives*, (100 U. S. 321), " When a Statute of the State denies his right or interposes a " bar to his enforcing it, in the judicial tribunals, the presump- " tion is fair that they" (the State courts) "will be controlled " by it in their decisions." So the Court of Appeals of Kentucky in an opinion *delivered after this grand jury had been selected*, and in which it declared the very law under which it was selected unconstitutional, in that it was a violation of the Fourteenth Amendment to the Constitution of the United States,

said: "This question has not been heretofore passed upon by "this court, and as the duty of selecting and summoning jurors "is devolved upon merely ministerial officers, we ought to as- "sume that in performing their duties they obeyed the statute "as enacted by the legislature, and that they excluded colored "persons from the jury because the statute declared them to "be incompetent, and consequently that the appellee was de- "prived by the statutes of a right which the Supreme Court "holds is secured to him by the Constitution." Now, what was the law under which this grand jury was selected?

By Sec. 1, Art. 5, Chap. 28 of the General Statutes of Kentucky, that State is divided into several judicial districts, and Fayette county constitutes one of the counties comprising the 10th District (Appendix A).

By an act of the Legislature approved February 13, 1873 (App. B), found on page 313 General Statutes, it is provided that regular terms of the Fayette Circuit Court shall be held at Lexington beginning on the 3d Mondays of May and November and continue each 24 juridical days.

By Sec. 1, Art. 4, Chap. 62 General Statutes (App. C) the Court is required to appoint three jury commissioners *possessing the same qualifications prescribed for petit jurymen*, one of which was that he should "be a white citizen" (App D,), to select the petit and grand jurors for *the next term.*

By Sec. 1, Art. 2, Chap. 62 General Statutes (App. E) these jury commissioners are required at the time they select the petit jury to select by the mode therein prescribed sixteen "citizens" to serve on the grand jury, "*who shall be reported to the Court and constitute the grand jury for the next term.*"

By Sec. 1, Art. 1, Chap. 62 General Statutes (App. F,) it is provided that "no person shall be qualified to serve as a grand-juryman unless he be *a white citizen*, &c."

These being the laws of Kentucky at the time the grand jury, which found this indictment, was selected at the May Term of the Fayette Circuit Court, 1880, and they never having been repealed or declared not binding upon the officers of the State by its court, it must be taken for granted for reasons hereinbefore quoted from the cases of *Virginia vs. Rives* and *The Commonwealth vs. Johnson*, that the judicial and ministerial officers

of the State of Kentucky obeyed these laws when they selected the grand jury herein and in doing so the court selected, at its May Term 1880, only white citizens for jury commissioners. And those jury commissioners selected only white citizens for the grand jury, for the next term (November 1880) of that court, which found this indictment.

Thus it appears plain in this case that the grand jury which found this indictment was selected by jury commissioners then appointed, at the same term of the Fayette Circuit Court, at which the petition was filed which transferred the case to the U. S. Circuit Court. And that that grand jury was selected under the same laws which were declared by that U. S. Circuit Court to be unconstitutional.

This exclusion, by the law of Kentucky and by its judicial and ministerial officers in obedience to that law, of all citizens who did not belong to the class known as white was a violation of this plaintiff's right under the Constitution which the trial court "was bound to redress." But if it and the appellate court failed or refused to do so then this Court will correct the error upon review.

But it may be said that while the statutes of Kentucky were as above stated and remained so until changed by act of the Legislature of that State, approved 1882 (App. G), yet these laws, in so far as they confined the selection of jurors to the class of citizens known as white were declared by the Supreme Court of the State unconstitutional.

Admitting, even for argument's sake, that this Court will take judicial notice of that *judicial change* in the laws of a State, yet even that decision (*Commonwealth vs. Johnson* 78 Ky. 509,) will not reach this question here, for that court in that very decision used the language that we have heretofore quoted in full saying in effect that their decision would affect only *subsequent proceedings under those laws*, and we have shown that this grand jury was selected under the law in May 1880, *before that opinion was delivered, which was on June 29th*, 1880 (78 Ky. 509), when by the law that term of the Fayette Circuit Court had expired.

III.

The conclusions arrived at in the discussion of the second

error assigned is decisive, also of the third. For if the court erred in not quashing the indictment, because *by the laws of Kentucky* all members of the race to which this plaintiff belongs were excluded from service either as jury commissioners, to select the grand jury, or as grand jurymen *because of their color*, then the Fayette Circuit Court erred in not granting his petition for a removal to the U. S. Circuit Court under the 641st Sec. U. S. Rev. Statutes and in proceeding further in the trial of the case after he had filed his verified petition stating these facts and asking such transfer to the U. S. Circuit Court. *Strauder vs. West Virginia* (100 U. S. 303).

That this second indictment was found in the same court under the same laws as the one which had been quashed by the U. S. Circuit Court is strong support to the position for which we have contended under the first error.

IV.—V.

The fourth and fifth errors assigned being based upon the action of the Fayette Circuit Court in this case on the 19th day of the May Term 1881, and exceptions taken to that action, will be best discussed together (Rec. pp. 28–33).

That action and those exceptions are in the record by a bill of exceptions made up and verified by three bystanders, and without any reason being certified by the judge why he refused to sign or allow it to be filed. This, as the Kentucky Court of Appeals long ago decided, was sufficient.

Said that court in *Hall vs. McCann* (Hardin 479), in a similar case: "A bill of exceptions signed by bystanders and entered of record is to be taken as part of the record." And again in *Wright vs. Nichols* (1 Bibb 298) the same court said in effect "if the bystanders certify that the statements are true and if "the court refuses to certify why it refused to sign it, it will be "taken as true upon the certificate of the bystanders." And these decisions, simply confirming the protection that the common law gave against the tyranny of a trial court, have remained undisputed in that State until now, although we venture the belief that a defendant on trial for his life has not for very many years been forced to resort to such protection in his legal rights.

We believe, too, it is settled law that while a judge must

exercise his judgment as to whether a bill of exceptions is true or not, and his discretion as to whether the circumstances entitle a party to a new trial or not, yet the signing of the Bill of Exceptions and the granting of a new trial are ministerial acts. *People vs. Sur. Court New York* (5 Wend. 114), (50 Indiana 1).

On the 5th day of a twenty-four day term (App. B,) this verdict was returned into court, and on the 7th day the court pronounced judgment upon that verdict although the Criminal Code of Kentucky, Sec. 283, provides that in felony cases the court shall not pronounce judgment until two days after the verdict, unless the court is about to adjourn. And by Sections 273-4 of the same code it is provided that

273—"The application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment be postponed to another term, in which case it may be made at any time before judgment."

274—"The grounds upon which a motion for a new trial is made must be stated in writing, and filed at the time of making the motion."

The reasonable construction of these sections taken together is that an application (and the number is not limited) for a new trial, with a statement of the grounds upon which it is asked, may be made at any time during the term at which the verdict was rendered. It being expressly provided that it shall be made *before judgment* in only one case, and that is when the judgment and also the motion is postponed to another term of the court. The statutory right of the defendant to make application for a new trial upon written grounds, filed with it, at any time during the term at which the verdict was rendered, is too apparent to admit of argument.

Nor can the court's refusal *to entertain* the motion for a new trial (Rec. p. 8) and the motion to set aside an order made in the case at that same term (Rec. p. 32) be sustained because it had not the power to do so, as its decision seems to imply. It is undisputed law as laid down by *Freeman on Judgments* (Sec. 90) that "The power to vacate judgments was conceded by the common law to all its courts. One rule is, however, undoubted. It is that the power of a court over its judgments during the entire term at which they are rendered is unlimited."

So too the motion (Rec. p. 32) to have the order overruling the motion for a new trial—made by the court in the absence of the defendant and his counsel, and without hearing argument—was one the defendant could make and have the court hear, as the Court of Appeals expressly decided in *Louisville R, & L. Co. vs. Kerr,* (78 Ky. 14), where it said: "It is true the court "having power over its judgments and and orders during the "term, has power to set aside an order overruling a motion for "a new trial," and that court reversed that case only because the lower court had set aside such an order *at a different term of the court* from that at which it was made. Thus showing that the action of the lower court upon such a motion was reviewable upon exception, and did not come within the prohibition of the 281 Section Criminal Code—that the action of the trial court upon motions for a new trial are not subject to exception. For whether a trial court will or will not grant a new trial, upon a motion asking it, is a matter for its discretion, *which, when exercised,* cannot be questioned upon exception in a higher court.

But that is a different question from the right of a party to file his motion and grounds asking a new trial, and to have the trial court *entertain* and hear his motion and *exercise its discretion* in deciding it. A party has the right to ask in a court of justice for a new trial, and to be heard upon it. And if this is refused by the trial court, and that refusal excepted to, it is such an error that a higher court will take cognizance of, and hear him, which the lower court refused to do, upon the grounds and evidence which he offered in the lower court, *even if* the request is based upon the denial to him in the trial, of rights, the enjoyment of which is guaranteed to him by the Constitution of the United States and the laws of Congress made for their enforcement.

The refusal of the Fayette Circuit Court to entertain this plaintiff's motions, is an entirely different question from its refusal to grant them after it had heard them. Exception to the former is an exception to the denial of a right in a trial before a court, which is always subject to correction in a higher court upon review. Exception to the latter is an exception as to whether a trial court properly exercised its discretion—which a higher court cannot review.

The motion, which the court refused to hear—to set aside the order overruling plaintiff's motion for a new trial—was a legitimate motion, which the plaintiff had a right to make; and which the court could not refuse to entertain without denying him a hearing in court. It was not a motion for a new trial.

That motion raised a question under the Constitution of the United States, and the court's action upon it will be re-examined here. (*River Co vs. Kan. Pac. Ry. Co.*, 92 U. S. 316.)

Therefore, we say this court will grant this plaintiff the hearing upon those grounds, which raises a question under the Constitution and laws of the United States, and grant him a new trial if they show that he is entitled to one under the law.

That they will do so, will, we think, be undoubtedly shown in the discussion of the sixth, and last error assigned.

VI.

That is, briefly, that the officers of the State of Kentucky, who were charged with the duty of selecting the petit jurors which were to try him, unlawfully and in violation of his rights discriminated in doing so, in that they selected and summoned only white men, and refused to summon others, belonging to the same race and of the same color as this plaintiff, because of their race and color, although there were many of them eligible and qualified for such service.

If it can be shown by any facts, of which "this court might take judicial notice," (103 U. S. 397) that the grand or petit jury which was summoned in this case *was composed entirely of white men*, because the State, acting by its officers, refused and failed to summon citizens of any other class, because of their race and color, (100 U. S. 347), then, was it such a denial of this plaintiff's rights under the Fourteenth Amendment as this Court will redress upon review, (103 U. S. 394.)

In *Neal vs. Delaware*, (103 U. S. 386), this Court said: "That to compel a colored man to submit to a trial before a "jury drawn from a panel from which was excluded, because of "their color, every man of his race, however well qualified by "education and character to discharge the functions of jurors, "was a denial of the equal protection of the laws." And it had before said in *Strauder vs. West Virginia*, (100 U. S. 347)

that "A State acts by its legislative, its executive or its judicial "authorities. It can act in no other way. The Constitutional "provision, therefore, must mean that no agency of the State, "or the officers or agents by whom its powers are executed, "shall deny to any person within its jurisdiction the equal pro- "tection of the laws Whoever, by virtue of public position "under a State government, deprives another of property, life, "or liberty, without due process of law, or denies or takes "away the equal protection of the laws, violates the Constitu "tional inhibition, and as he acts in the name of the State, and "is clothed with the State's power, his acts is that of the State. "This must be so, or the Constitutional prohibition has no "meaning. Then the State has clothed one of its agents with "power to annul or to evade it."

We have heretofore shown, we think, that this discrimination was made, before the commencement of the trial, in the selection of the grand jury, by the State of Kentucky, acting through its legislative department.

That the same discrimination was made by the State, acting through its subordinate officers, whose duty it was to select petit jurors for the trial of the case, is also evident from this record. Whether or not this was done, as said by this Court in another case, involves "the fairness and integrity of the whole proceeding against the prisoner."

Necessarily, if this discrimination is made, it must be after the trial has commenced and during its proceedings, when, "as in this case, the subordinate officers whose duty it was to select jurors, failed to discharge that duty in the true spirit of the laws, and excluded all colored men, solely because they were colored." (100 U. S. 322).

We are duly impressed that the decision of this question, as said by this Court in *Neal vs. Delaware*, (103 U. S. 389), "is of the highest moment to that race, the security "of whose rights of life, liberty and property, and to the equal "protection of the laws, was the primary object of the recent "amendments to the national Constitution."

And if that decision of this court is not to be maintained, in its full intendment, then in vain did the people adopt the Fourteenth Amendment to protect that race from such "legal

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" discriminations, implying inferiority in civil society, lessening " the security of their enjoyment of the rights which others en- " joy, and discriminations, which are steps towards reducing " them to the condition of a subject race" (100 U. S 308).

Conscious that the discrimination complained of was exercised—and the record in this case so bristles with indications of it as, in its perusal, to prick the attention on almost every page —yet more direct proof of it than is made in this case, cannot we conceive be made in any case.

There is no way to enter the inner consciousness of those officers whose duty it was to select and summon these jurors and find out why they passed one, two, three, aye, a dozen colored men, eligible and qualified to be summoned, and to perform such service, only to select and summon the thirteenth man, who happened to be a white man. That this should be done once in a trial might indicate nothing. but that it should be done until perhaps five hundred such colored men should have been passed and not one summoned, and ninety-three white men met and all summoned, presents a *prima facie* case of denial,—by those officers charged with the selection of that jury,—of that equality of protection which has been secured by the Constitution and laws of the United States (103 U. S. 397), and shows that such action of those officers was the natural result of those prejudices, which often exist against a particular class in a community, which sway the judgment of jurors and which therefore operate to deny persons of that class the full enjoyment of that protection which others enjoy (100 U. S. 399).

Nor could these officers be expected upon examination to say that their action was the result of such prejudices, and that they excluded all these colored men because of their race and color. Because for them to do so is an offense for which they could be indicted and punished. (*Ex parte Virginia* 100 U. S. 339.)

But enough has been brought to the judicial notice of this court by the record in this case to make either of the above modes of proof unnecessary.

The regular panel of jurors was challenged by the plaintiff before the trial began (Rec. p. 10), and this was supported by his *sworn affidavit and petition* filed at the same time. The facts con-

tained in it were not controverted, and unless they were they had to be taken as true. Undoubtedly they supported the lawfulness of that challenge to the regular panel.

But it is evident from the record that the jury was not all selected from the regular panel. An additional panel of seventy-five jurors was ordered by the court, which in seeming fairness it directed should be summoned "without regard to race, color or previous condition of servitude."

Yet when the officers presented those summoned one by one until the prisoner had exhausted all of his peremptory challenges, and ninety-three of them had been examined—all of whom belonged to the same class and not one of them of the same race or color as the prisoner himself—the court took no notice of the evident disregard by its officers of its direction. Nay, more, when the prisoner offered to show by proof there had, and now in this record, and by other proof there offered, that these officers had not only disobeyed the court's direction, but that his rights under the Constitution and laws of the United States had been violated in the trial—*which fact he could not have known until then*—the court refused to hear him. Was it because that court could do no wrong?

But the evidence that wrong had been done to the plaintiff is here in the record, and that court and the Court of Appeals too, having refused to right that wrong, this court is asked do so.

The proof upon which this plaintiff asked and, as we think we have shown was entitled to be heard, is conclusive: that nearly one half of the population of Fayette county from which the jury to try this case had to be selected, belonged to the same race as the plaintiff; that although such was the case, yet nevertheless, no member of that race was selected or summoned to serve on either the petit or grand jury in this case, although ninety-three persons were examined in selecting the former alone; that no member of that race has *ever* been selected to serve on any grand or petit jury in that court at all. (Rec. p. 28-33).

Comment, it seems to us, is unnecessary.

Upon more direct evidence, than was given in that case, this one is upon this question clearly within the decision of this court in *Neal vs. Delaware* (103 U. S. 370).

With this we conclude this argument for what we conceive to be the law of this case, conscious that we have used our best abilities in the discharge of an onerous duty which is sometimes imposed upon members of our profession. The burden of that duty has, we are free to say, been lightened here, because we have entertained a sincere conviction that this plaintiff is not guilty of the offense with which he is charged, and because his friendlessness has appealed to our sympathy.

We submit his cause to this honorable Court, knowing that now there is nothing between him and death, save and alone that law of his country which we in our humble efforts, may have invoked in his behalf. May you so decide that law, as to release him from a judgment which is only unjust and cruel, as it was the result of a prejudice which, though innate, was unlawful when it convicted. Respectfully submitted,

L. P. TARLTON, JR.,
Attorney for Plaintiff.

# APPENDIX.

Below are given so much of the Statutes of the State of Kentucky cited and referred to as necessary to the decision of this case:

A.

*Sec.* 1, *Art.* 5, *Chap.* 28, *General Statutes.*—The Commonwealth of Kentucky is divided into sixteen circuit court judicial districts, composed of the several counties, as follows: * * * * Tenth District—Bourbon, Fayette, Jessamine, &c.

B.

*Act General Assembly, Ky., Approved February 13th,* 1873—That from and after the first of July, 1873, the terms of the circuit courts in the tenth judicial district of this Commonwealth shall commence and be held in the several counties as follows:

1st. In the county of Fayette on the third Mondays in May and November, and continue each twenty-four juridical days; and a term for the trial of chancery, criminal, and penal causes, in said court, shall commence and be held on the third Monday in February, and continue twelve juridical days.

C.

*Sec.* 1, *Art.* 4, *Chap.* 62, *General Statutes.*—The court, requiring a regular panel of jurors at their several terms, shall appoint three jury commissioners, possessing the qualifications prescribed for petit jurymen, resident in different portions of the county, and who have no suit in court which requires the intervention of a jury.

D.

*Sec.* 2, *Art.* 3, *Chap.* 62, *General Statutes.*—No person shall be a competent juryman for the trial of criminal, penal, or civil cases in any court, unless he be a white citizen, at least twenty-one years of age, a housekeeper sober, temperate, discreet, and of good demeanor.

*Sec.* 4, *Art.* 3, *Chap.* 62, *General Statutes.*—No sheriff or

other officer shall at any time summon a juror not qualified as herein required.

E.

*Sec.* 1, *Art.* 2, *Chap.* 62, *General Statutes.*—The jury commissioners, when they select the petit jury, shall in the same mode, select not less than thirty-two citizens and housekeepers qualified to serve on the grand jury, selecting them, as far as practicable, from different parts of the county, from which they shall by lot select sixteen, who shall be reported to the court and constitute the grand jury for the next term. The list so returned, sealed, shall be disposed of by the court and clerk, and the grand jurymen be summoned in the same way and manner by the sheriff, as in the case of the petit jury.

F.

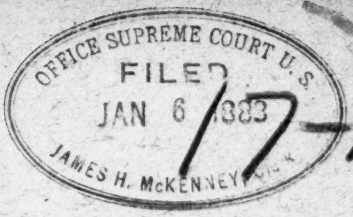
*Sec.* 1, *Art.* 1, *Chap.* 62, *General Statutes.*—No person shall be qualified to serve as a grand juryman unless he be a white citizen and a housekeeper of the county in which he may be called to serve, and over the age of twenty one years.

G.

*Act General Assembly, Ky., to amend Chap.* 62, *of the General Statutes, Approved January* 26, 1882.

Sec. 1.—That section (1) one, article (1) one chapter (62) sixty-two be amended by striking out the word "white, in the second line of said section.

Sec. 2.—Section (2) two of article (3) three of said chapter is amended by striking out the word "white" in the third line of said section (*Acts* 1882, vol. 1, page 15).




17-1110

# BRIEF FOR DEFENDANT IN ERROR.

## SUPREME COURT OF UNITED STATES.

### OCTOBER TERM, 1882.

### NO. 1130.

*JOHN BUSH, Plaintiff in Error*

*vs.*

*THE COMMONWEALTH OF KENTUCKY.*

In Error to the Court of Appeals of the State of Kentucky.

# SUPREME COURT OF UNITED STATES.

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*OCTOBER TERM, 1882.*

JOHN BUSH, *Plaintiff in Error,*
*vs.* No. 1130.
COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

John Bush was indicted on the charge of murder in the Circuit Court of Fayette county, Kentucky at its November term 1880, (printed record, page 8 and 9,) and was on his trial at the following May term found guilty and sentenced to death. He thereupon prosecuted an appeal to the Court of Appeals of Kentucky; and the judgment of the Circuit Court being there affirmed, he now prosecutes a writ of error in this court. His contention in substance is that in his trial in the State Court he was denied "the equal protection of the laws" guaranteed to him by the 14th Amendment to the Constitution because as he alleges the race to which he belongs was the subject of illegal discrimination by reason of race or color, in the selection of the jury that tried his case. Whether this contention is sustained by the record is the sole question for the decision of this court.

At the same term at which the indictment was returned the accused moved to file an affidavit, (page 9 printed record) which motion

was disallowed. His claim in substance was, that inasmuch as a former indictment for the same cause had been removed to the United States Circuit Court, that the jurisdiction of the State Court to inquire into that crime was by the fact of removal forever gone; although without a trial on the merits, the original prosecution had been brought to an end by the order of the United States Court quashing the indictment and discharging the accused, or in effect remanding him to the custody of the State authorities. (Printed transcript, page 15.)

At the May term, 1881, the State Court when assigning the cause for trial which commenced two days afterwards, entered an order directing the Sheriff to summon a special venire of seventy-five competent jurors, and instructing their selection "without regard to race, color, or previous condition of servitude." (Printed record, page 10.)

Before the trial commenced, the accused by his counsel entered motions to quash and set aside the indictment and to quash the panel of petit jurors, incorporating in the motion a recitation of their grounds, which being submitted to the court without proof, affidavit, or other attempted manifestation of their truth were successively overruled. (Printed transcript, page 10.)

The accused then as the record states, (page 10) filed his petition for the transfer of the cause to the United States Court, (but no such petition appears in the transcript) which motion was also overruled.

The jury was then selected and sworn and tried the case, and at no period during nor after the selection of the jury nor during the trial did the accused make any further objection to the jury or to any member of it, nor to the conduct of the Sheriff nor to the action of the court on account of any supposed discriminations against his race or color.

After verdict and judgment he moved for a new trial, and in accordance with the law filed the grounds for his application; none of which embraced the matter of his present complaint. (See motion, page 11, grounds, page 27.) This motion was made and overruled on the 24th of May. On the 6th of June as appears by a bill of exceptions attested by bystanders, (the value of which will hereafter be the subject of remark) he moved, to be allowed to file additional grounds for a new trial, and that the court set aside its order overruling the former motion for a new trial, (Page 28). In those grounds and the affidavits offered in their support the accused attempted for the first time any proof whatever intended to sustain his present claim that he

had been denied "the equal protection of the laws" by race discriminations in the selection of the jury.

The defendant in error submits:

1. That no Federal question is presented in any competent form, consequently that this court has no jurisdiction.

2. Admitting the jurisdiction, the judgment should be affirmed.

We will not attempt to give to each of these heads a separate discussion; but, without other method than convenience shall suggest, will as briefly as we can present such reasons as we may be able to render, why the judgment of the State court should not be reversed.

The rule of decision governing this court on writs of error to state courts has been so often declared since the earliest days of this court, and must be so familiar as to render unnecessary any discussion or scarcely even a statement of the principle. The record must show an erroneous decision by the state court denying to the plaintiff in error a federal right, and that the erroneous "decision was necessary "to the determination of the cause, and that it actually was decided, "or that the judgment as rendered could not have been given without "deciding it." It must appear that the decision on the federal question "was controlling in the disposition of the cause." Selecting from the numerous cases, we cite: Brown vs. Atwell, 92, U. S. 329; Citizen's Bank vs. Board, &c., 98, U. S. 141; Broughton vs. Exchange Bank, 104, U. S. 427; and the authorities cited in these opinions.

If in addition to the federal question, there likewise be involved a question of State law or of judicial discretion, and the judgment of the State Court is, or reasonably may be based on a determinaiton of the local question, and that decision is broad enough to support the judgment, the jurisdiction of this court fails.

In the application of these principles to the case on hearing, we shall not only have occasion to discuss this case as presented by the transcript on file as the record is claimed to be by the plaintiff In error, but shall endeavor to show that certain parts of the transcript are not made up and certified in accordance with law so as to constitute a

part of the record, and must be excluded by the court in reaching a judgment on the case.

We proceed to consider the different errors assigned, in what seems to us the most convenient order; and

*First.* We take up the alleged error of the court in refusing to dismiss the indictment at the November term, 1880, based on the fact that a former indictment upon the same charge had been removed to the United States Circuit Court, which, as it is contended *ipso facto* forever ousted the jurisdiction of the State Court to try the accused on the murder alleged against him in that indictment. The transcript on file presents the facts in a very confused and unsatisfactory way; but, assuming the fact to be as claimed in behalf of the plaintiff in error, that after the accused had been indicted in the Fayette Circuit Court, tried and sentenced to death on the matter now charged against him, and after a new trial awarded him by the mandate of the Court of Appeals reversing the judgment of the Fayette Circuit Court, the accused applied for and obtained a transfer of his case to the United States Circuit Court, and that that court, without a trial on the merits, by an order of the 19th of October, 1880, quashed the indictment against him and ordered that he be released from the custody of the United States Marshal, in Lexington, Ky., after giving due notice to the proper State officers. (See page 15.) Assuming for the present that all these facts are presented in a competent form, can they have any such effect as is claimed for them by the counsel for the plaintiff in error?

Here by the facts assumed the accused obtained a removal of his cause to the United States Court. The proceedings upon that indictment are brought to an end without a trial and without any proceedings to constitute a bar to another indictment. How can it be contended that these facts constitute an obstacle to a new prosecution by any court of competent jurisdiction? We are not able to perceive any reason, either in the principles that governs the relations of State and Federal Courts, nor in the Statute laws of the United States to justify the conclusion contended for. Every beneficent and proper object of the Statute, authorizing the removal of causes is fulfilled when the party petitioning for and obtaining a removal of his cause is allowed, without interference by the StateCourt, to bring the cause to a final dis-

position in the court to which the removal is made. If it is brought to an end by any proceedings short of what, under the general principles of law will constitute a bar to another proceeding, no good object we submit can be effected by construing the language of these statutes as ousting any court of its ordinary jurisdiction over a new action or prosecution, or as confining the jurisdiction of a new case to the U. S. Court to which the former case had been removed. Considering the object to be attained and the language of section 641 of the Revised Statutes, we submit that the construction contended for by the plaintiff's counsel is inadmissable; but if it were otherwise, and the language of the statute were held to sustain the plaintiff's contention, we suggest that such an enactment would in its application to this case exceed any proper construction of the powers of Congress; at least in the absence of any method by which a new prosecution may be instituted in the Federal Court.

But even if the court should differ in opinion from this view of the law, we contend that so much of the transcript on file as is supposed to present this question is no part of the record, and cannot be considered for any purpose. The record proper—the transcript from the order book of the Fayette Circuit Court—merely shows that the accused moved to file an affidavit, without identifying it, and the court refused to permit it to be filed. (Printed record, page 9).

This showing is sought to be supplemented by a bill of exceptions, according to the statements of which the motion is enlarged "*to dismis the case*," and exhibiting in support of the motion the affidavit of the accused, and a transcript of a record from the United States Circuit Court. (This bill of exceptions and the affidavit of the accused and the transcript from U. S. Court are embraced between pages 12 and 15 of the printed transcript).

Now we confidently submit that the supplemental facts sought to be thus introduced by this so called bill of exceptions, purporting to be a statement of transactions at the November term, 1880, are in no sense a proper part of this record, nor is the writing containing them a legal bill of exceptions. The court will observe that this pretended bill of exceptions purports to be a statement of a motion offered upon affidavit &c., *at the November term 1880*, and is not noted a referred to on the record till June 11th, 1881, two terms after the exceptions purport

to have been taken. The statute law of Kentucky as contained in the criminal and civil codes and the decisions of her Court of Appeals establish the law on this point beyond any possible controversy to be that the bill of exceptions to be of any validity whatever must be signed and noted of record at the same term at which the exception is taken, or that during that term a day must be fixed by order of the court in the next succeeding term at which the bill of exceptions may be tendered. Criminal Code of Kentucky, Sect. 282; Civil Code of Kentucky, Sect. 334; Vandever vs. Griffith, 2 Metcalfe (Ky.) 425: Tweedy vs. Commonwealth, 2 Metcalfe, (Ky.) 379; Smith vs. Blakeman, 8 Bush, 480; Freeman vs. Brenham, 17 B. Monroe, 603; Scott vs. Burrows, 13 Bush, 451; Lynch vs. Reynolds, 6 Bush, 548.

The Civil Code whose provisions on this subject are adopted by the section of the Criminal Code above cited provides: Sect. 334, "The "party objecting must except when the decision is made; and time may "be given to prepare a bill of exceptions, but not beyond a day in the "succeeding term *to be fixed by the court.*"

The cases above cited and others which might be cited clearly and authoritatively decide that the omission to note a bill of exceptions at the term at which the exception is taken or to obtain an order of the court at that term fixing a day certain in the next for its presentation is under the law of Kentucky a fatal omission, which cannot be cured at a subsequent term by a *nunc pro tunc* order or otherwise. A bill of exceptions not so noted is valueless; and that the State law is conclusive on this subject we suppose is not open to doubt.

On the above considerations we submit that this court cannot adjudge that an error is exhibited in the court's refusal to allow the accused to file his affidavit or motion to dismiss the case on the grounds attempted to be exhibited by this so-called bill of exceptions.

*Second.* Did the State Court err in disregarding the petition of the accused on May 18th, 1881 to transfer the case to the United States Court?

We think this question must be answered in the negative.

1. The record sets forth (page 10) that the accused filed a petition for the transfer of the cause to the United States Court; but no such petition appears in the record, We submit that this court cannot hold otherwise than as held by the Kentucky Court of Appeals, that it is impossible that the court should presume error in refusing to regard that motion without such an inspection of the petition as will enable the court to see that the facts are sufficient to authorize the removal.

2. In point of fact there were no grounds for the removal. In June, 1880, the Court of Appeals. the highest tribunal of the State of Kentucky, whose decisions are binding on all its inferior tribunals, had decided the statute fixing the qualification of grand and petit jurors unconstitutional so far as color or race was a disqualification for jury service. Commonwealth vs. Johnson, 78 (Ky.) 509. Two days before this motion for removal was made the Fayette Circuit Court in assigning this cause for trial had by an order to the Sheriff directing a special venire to try it, expressly instructed that officer to select the jurors "without regard to race, color or previous condition of servitude." (Page 10). In view of these facts, that the highest tribunal of the State had declared the word white in the jury law unconstitutional and inoperative so for as it was a disqualification of any one, and the previously expressed acceptance of that doctrine by the court in which the cause was to be tried, in what sense could it be said that the accused was laboring under any "*inability*" to enforce the right to a jury impartially selected "resulting from a *legislative denial*?" Virginia vs. Rives, 100 U, S. 320; Neal vs. Delaware, 103, U. S. 393. The accused could not then have truthfully said that there was any inability resulting from a legislative denial of his rights, under an act which had been pronounced unconstitutional by the highest State Court, and had been declared inoperative as to this cause by the court in which the cause was pending; and if he had been so reckless as to declare it the court well knew the statement to be untrue, and was justified in disregarding it.

*Third.* Did the court err in refusing to set aside the indictment,

or to quash the panel of petit jurors? Or was there error in the subsequent refusal of the court to rehear the motion for a new trial?

1. On the matter of the court's refusal to award a new trial, it is clear law repeatedly announced by this court that on any writ of error which brings up for review errors of law only, this court cannot revise the action of any inferior court on a motion for a new trial, or on any question addressing itself to the judicial discretion of the inferior Court.

Kerr vs. Clampitt, 95, U. S. 189.

Railway Co. vs. Twombly, 100, U. S. 81, and authorities there cited.

Railway Co. vs. Heck, 102, U. S. 120, and authorities there cited.

Pomeroy vs. Bank of Indiana, 1 Wall. 597 and 598.

Spears vs. Story, 4 Wallace 595.

Mulhall vs. Keenan, 18 Wallace 342, 350.

Such being the law as it relates to a review of the decisions of inferior courts on motions for new trials, does it not apply with equal if not greater force to the anomalous motion to set aside the order refusing a new trial? One motion for a new trial is allowed to every disappointed litigant. It is the convenient and orderly method by which he may ask the court which has tried his case, to review the trial and correct any errors that maturer consideration may have disclosed.

When the trial court acts adversely on that motion his only redress lies in the appellate tribunal. He has had his day in the lower court, and can say or do nothing more save what is merely preparatory to an appeal to the superior tribunal. Such we presume to be the law everywhere; and it is certainly the law of Kentucky. Louisville, Rock & Co., vs. Kerr. 78 Kentucky, 13. In this case the Court of Appeals commenting on the identical motion now being considered in effect declares that the courts cannot entertain such motions nor the parties make them. If it were otherwise "no reason is perceived why motions "and counter motions may not be continued indefinitely. When a "motion for a new trial has been made and overruled, the only redress "of a defeated litigant is by appeal * * * * If the courts have "power to entertain such motions, it would seem to follow that parties "have a right to make them, and to concede this is to render litigation "practically interminable. There is no authority for a motion to re-"hear a motion for a new trial &c," 78 Kentucky, 14 and 15. While we

suppose that these principles of practice would be equally applicable to all courts, it is sufficient for us that such is the settled law governing the practice in Kentucky courts. For it is a condition precedent to the jurisdiction of this court to reverse the judgment of a State Court, that the party complaining of a denial of a federal sight, should have made claim of his right in the regular and orderly course of proceeding in the State Court in accordance with the settled rules of practice there prevailing, unless indeed such rules of themselves unreasonably abridge the right he claims, and renders its enforcement impracticable or unreasonably difficult. Subject perhaps to the same limitation, it is likewise his duty to so conform his claim to the laws and practice of the State Courts that on appeal to the highest State Court having jurisdiction of his case, that tribunal whose adverse decision on the federal question is a condition precedent to the jurisdictions of this court, may give its opinion on the merits of the federal question without doing violence to the laws that govern it or to its established methods of precedure.

If we are right in the view we have been presenting the refusal of the Circuit Court to entertain the anomalous motion or to permit tne accompanying affidavits to be filed is not a reversible error, but was right; and it follows from these principles that after the original motion for a new trial was overruled the only remaining right of the accused in that court was to pray his appeal, and in order to make that appeal available, to prepare and tender a bill of exceptions setting forth such transactions of that term of the court, not already of record as he relied on for reversal in the Appellate Court; and his rights did not extend to the making of any new case or claim, or to the presentation of any additional proof upon any of the questions that had previously been acted on by the court. The affidavits offered in connection with the rejected motion, were at most, only an extraordinary appeal to the discretion of the lower court. and on this writ of error are entitled to no consideration whatever, The showing thus attempted to be made cannot in any event be awarded a retrospective effect to manifest error in any of the previous rulings of the court, even though the evidence sought to be introduced might have been entitled to weight if presented at the proper time. This court in Kerr vs. Clampitt, 95, U. S. 189 and 190, uses this language: "We have no jurisdiction to revise "the action of an inferior court upon the question of granting or refus-

"ing a new trial, however meritorious the grounds presented for its "consideration or erroneous its decision. *The final judgment cannot "be examined through the rulings of the court upon that question. If " therefore when the final judgment is brought before us for review by "writ of error. no other documents are presented for our consideration "than such as were before the inferior court upon the application for "a new trial, we cannot look into them*; and if error is not disclosed by "the record the judgment must be affirmed;" 95 U. S. 189 and 190.

If the views above submitted be correct, then the plaintiff's claim to a reversal in this case must rest wholly on the alleged error of the lower court in refusing his motions to quash the indictment and the panel of jurors. Those motions were confessidly submitted and decided without the least showing of the truth of the grounds on which they were based. It is impossible to attribute error to these rulings of the court upon motions sumitted without evidence of any kind, except on the assumption that facts sufficient to sustain them were within the immediate observation of the court at the time of the hearing. If any such facts were thus made known to the court, the only proper method of preserving them for the Appellate Court is by a bill of exceptions; in the absence of which there is nothing upon which the Appellate Court can act. It is the appropriate and peculiar office of a bill of exceptions to make record of such facts, outside of the record proper, as the excepting party may wish the Appellate Court to be informed of.

Before the Statute of Westminster, 2, there was no method known to the common law of bringing errors not embraced in the ordinary record before the superior court. 1 Bacon's Ab. Title, Bill of Exceptions. page 325. Since that time we contend that there is no other approved method of reaching that result, except by the use of bills of exceptions, as provided for by that statute, or by methods of a similar nature provided by the statute laws of the different states.

If, therefore, any facts were exhibited to the court on these motions, or if any pertinent fact, such as the race and color of the jurors or grand jurors was apparent to the judge of the court from the use of his senses, the orderly and exclusive method of exhibiting such facts to the Appellate Court is by bill of exceptions, prepared and presented for signature to the Judge. It is only when the judge re-

fuses to attest a fact, or when he improperly corrects a bill of exceptions tendered to him, that by the law of Kentucky, the party may make a bill of exceptions by the affidaaits of by-standers; and, then, the only office of such a bill is to attest the very fact or facts which the Judge, when asked, had refused to certify. Civil Code of Ky., Sect. 337, sub sect. 3. In this case the Judge was never asked to certify any fact or evidence occurring at the time of hearing these motions, nor anything relating to the composition, color or race of the grand or petit juries, nor any fact tending in any degree to show race discrimination in their selection. Neither does the bill exceptions attested by by-standers exhibit any such facts, (page 32), and we submit that the affidavits offered to be filed with the latter bill of exceptions cannot be given any such retroactive operation as to taint with error previous rulings of the court on motions voluntarily submitted without evidence; rnd especially when no reason appears why the same evidence could not haae been offered at the proper time on the hearing of the motions.

It results from this view of the record, if it be the true one that it furnishes no colorable ground for the contention of the plaintiff in error that he has suffered a denial of right by reason of race discrimination in the selection of the grand or petit juries. So far from that, it does not even appear that these juries were not composed wholly or in part of persons of his own race and color.

Our discussion thus far on the effect and weight to be accorded to the bill of exceptions attested by the by-standers has been on the assumption that this is one of the cases in which the law authorizes a bill of exceptions to be attested in that manner.

But it will be observed that the only provisions for a bill of exceptions attested by by-standers in the courts of Kentucky, are contained in sub section 3 and 5 of section 337 of the Civil Code. The fifth sub section provides for the case when the judge, who presides at the trial does not preside when the motion for a new trial is overruled. The third sub section is limited to the case of "a party objecting to "the judge's *correction of an exception which purports to state the evidence.*" Civil Code, Sect. 337 sub sect. 3 and 5.

We sumit that neither of these provisions cover the present case, and consequently all that part of the transcript which depends for its

certification on the "bill of exceptions" attestested by the by-standers, as well as that writing itself should not be considered as any part of this record.

We have hitherto discussed the case mainly on our own view of the record. Let us now examine it as it is claimed to be by the plaintiff in error; assume that every part of it is what it purports to be; that the bills of exception are all properly certified; that the affidavits tendered after the hearing of the motion for a new trial are entitled to all the weight that can be claimed for them; and assign to the transcript and the different parts of it the import most favorable to the plaintiff in error. Remembering that the accused is incompetent as a witness for himself, and therefore rejecting his own affidavit as proof, does the case still show any thing more than this court has distinctly pronounced insufficient to make out the claim of denial of a federal right? We quote the language of the Court in Virginia vs. Rives, 100 U. S., 322: "The assertion in the petition for removal that the grand jury by "which the petitioners were indicted, as well as the jury summoned to "try them, were composed wholly of the white race, and that their race "had never been allowed to serve as jurors in the county of Patrick in "any case in which a colored man was interested, fall short of showing "that any civil right was denied, or that there had been any discrimina-"tion against the defendants because of their color or race. *The fact "may have been as stated, and yet the jury which indicted them, and "the panel summoned to try them may have been impartially selected.*" 100 U. S. 322. Now the facts here pronounced by this court insufficient to show that any civil right was denied, comprise with the single exception of the relative numbers of the white and colored races every fact embraced in the affidavits offered on the motion to rehear the application for a new trial. Nor is there any thing in the case of Neal vs. Delaware which overrules the opinion above cited. On the contrary that case is a strong confirmation of the doctrine above quoted.

It is true the Delaware case comments on the fact there shown that the number of colored citizens in the locality of the trial constituted a considerable proportion of the entire population. But we think it clear from the opinion that the affidavit of the accused, which in ex-

press terms alleges an illegal discrimination, and was admitted as proof by the consent of the attorney for the State is the turning point of the case without whioh the decision would not have been reached. Indeed the question of the admissibility and effect of that affidavit constitutes the main question discussed, and special stress is laid on the fact that it was heard by consent, "without objections to its com-"petency as evidence, and uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned." Neal vs. Delaware, 103, U. S. 396. The refusalof the State Court under the special circumstances of the case to allow additional proof on the motions after they were overruled is also commented on by this court, not as of itself constituting a sufficient ground for reversal, but as fortifying the conclusion of the court drawn from the other facts of this case. From all the circumstances the affidavit of the accused in that case was held admissible as evidence, and seems to have been accorded a weight it could not otherwise have been entitled to.

To sustain the plaintiff's claim to a reversal, it must appear both that the ministerial officers of the State charged with the selection of the juries excluded colored persons solely on account of race or color; and, that in proper time, and in the orderly course of proceeding, the accused applied to the trial court to correct the wrong with an exhibibition of sufficient evidence to manifest the truth of his complaint, and that the court refused him redress.

It has never been held by this court that the fact that none of the colored race were summoned on the jury, accompanied with evidence that citizens of that race were relatively numerous in the locality of the trial makes out a case of illegal discrimination. On the contrary as we have before attempted to show, the decision on this subject support the reverse of that view- If it be a fact as is claimed, that colored persons are seldom summoned to jury service, that fact may be in a large measure at least be attributed to other cauces than race prejudice. The position of the juror properly considered, is one of grave responsibility. Only men of known integrity, intelligence and independence should ever be called to that service. The Kentucky statute requires jurors to be "house-keepers, sober, temperate, discreet and of good demeanor." Gen. Stat. Chap. 62, Art. 3; Sec. 2, p. 571. (The word white has by later statute been stricken out. 1 Sess. Acts 1881, p 15). The quali-

fications of jurors are elsewhere defined as follows: "Free from all "legal exceptions, of fair character and approved integrity, of sound "judgment and well informed." Gen. Stat. Chap. 62, Art. 4, Sec. 4.

Neither the 14th Amendment nor the varions acts of Congress, passed to enforce its provisions, nor the decisions of this court construing that amendment and those acts, have changed these qualifications. They have struck from the statute the word "white," and do require that according to the orderly methods of the peculiar statutes of each of the States, colored men may have an opportunity to select colored jurors; but not that the mere absence of a colored man from the trial jury shall be cause of reversal, nor that equal members of both races shall be summoned as venire men, color being the sole consideration to be regarded by the summoning officer. This is not the spirit of that amendment and those acts. They were enacted by men who knew that this colored race had in the Southern States a large proportion who were not qualified, and were in the North too few in numbers; and it was never intended that all juries who tried colored persons should be mixed juries. This court has described this race at the time of that amendment as "abject and ignorant," "mere children." 100 U,S. 306. While all good men may deplore this fact, it must be admitted that relatively the member of that race thus qualified is necessarily small. It is therefore certain that any rule which would require the juries to be made up of members of the two races in proportion to their relative numbers in a given community, would degrade the system of jurisprudence, based on the intelligence, integrity and purity of juries, as well as be incapable of practical application, and based on the vicious principle that the races are not equal before the law.

In view of the well-known fact that the persons of the colored race fitted for jury service are relatively few as compared with the numbers of that race and the entire population, giving proper effect to the well defined legal presumption that a sworn officer will faithfully perform his legal duties, aided in this case by the fact that he was specially and properly instructed by the court as to the manner of their performance, and also that that officer was so far superior to the race prejudice which is attributed to him, as to give on behalf of the accused his voluntary affidavit, (Affidavit D. page 31), which though it falls short of exhibiting the race discrimination that is sought to be proven, nevertheless illustrate that officer's kindly disposition toward the accused; we sub-

mit that in any view of this record the court would not be warranted to adjudge that that officer was guilty of that illegal discrimination which the law forbids.

And if that officer were guilty, the accused knew as each venire man was produced, sworn and examined, what was his color and race, and that illegal discriminations could then and there by proper legal proceedings have been brought to the attention of the trial court, and that if all his rights were not fully secured to him, that proper and orderly exceptions could have been entered so that on a record properly made the supervisory court could correct the errors of the trial court. The accused, without exception to the order to select seventy-five special veniremen, from whom so far as this record shows all the jury may have been selected, without exception to a single juror, without a motion to the court to require colored men to be summoned, selected the jury, submitted his cause to them, took the chances of a verdict, of a hung jury, or a lighter punishment, when the judgment was pronounced, a motion for a new trial was filed on other grounds, and the chances were taken on the action of the judge. When the motion was over ruled then the new motion was made.

We confidently submit that this court cannot reverse unless it does so on the broad ground that in a State Court a negro is entitled as a matter of right to a mixed jury, and is not subject to the rules of practice nor bound by the laws regulating procedure in State Courts.

Respectfully submitted,

W. C. P. Breckinridge,

J. D. Hunt,

Of Counsel for Deft. in Error.

# APPENDIX I.

We append a copy of Section 282 of the Criminal Code of Kentucky and of Sections 334 and 337 of the Civil Code, relating to bills of exception:

SECTION 282, CRIMINAL CODE.

The exception shall be shown upon the record, by a bill of exceptions, prepared, settled, and signed, as provided in the Code of Practice in civil cases.

CIVIL CODE.

§ 334. The party objecting must except when the decision is made; and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court.

§ 337. 1. If the decision be not entered on the record, or the grounds of objection do not appear in the entry, the party must prepare his bill of exceptions and present it to the judge for his signature.

2. Exceptions taken during the trial need not be noted of record, nor reduced to writing, unless by order of the court, until after the trial. *At the close of the trial,** the party excepting shall, unless further time be given him, prepare his bill of exceptions, which shall include all the decisions of the court excepted to, in consecutive order; and, if he except to a decision of the court in granting or refusing any instruction, all the instructions given and refused shall be also included.

3. If the bill of exceptions be approved by the judge, he shall sign it, and it shall be filed as part of the record, but not spread at large on the order book. If not approved, he shall correct it, or suggest the correction to be made, and sign it. The party objecting to the judge's correction of an exception which purports to state the evidence may, within five days after the bill is signed, file the exception as written by

*The words in italics are by Act approved February 27th, 1878, struck out, and in lieu thereof substituted, "*during the term at which the judgment becomes final.*" 1 Sess., Acts 1878, p. 24.

him, if its truth be attested by the affidavits of two by-standers; but its truth may be controverted and maintained by other affidavits filed in the Clerk's Office, not exceeding five on either side.

4. Affidavits controverting an exception not signed by the judge must be filed in the Clerk's Office, and notice of the filing given, within fifteen days after the filing of such exceptions; and affidavits sustaining such exception must be filed within fifteen days after such notice.

5. If the judge who presided at the trial do not preside when a motion for a new trial is overruled, the bill of exceptions may be certified by by-standers, and be controverted and maintained, persuant to the provisions of subsections 3 and 4 of this section.

## APPENDIX II.

We append also Section 340 of the Criminal Code of Kentucky relating to appeals by defendants in cases of felany.

§ 340. A judgment of conviction shall be reversed for any error of law, to the defendant's prejudice, appearing on the record.

When our brief was about ready for delivery, the counsel for the plaintiff in error submitted to us the proof-sheets of his brief—too late for full examination of the authorities cited, or for comment on them. On such an examination as we could make, we observe:

1. That the counsel wholly fails to draw the distinction so fully and ably pointed out in Virginia vs. Rives, 100 U. S.; in *ex-parte* Virginia 100 U. S., and in Neal vs. Delaware, 103 U. S., between the statutory denial by a state of a right guaranteed by the Constitution and Laws of the United States, and the judicial denial by the erroneous decisions of the State Court on the improper conduct of a ministerial officer.

2. He also wholly confused the proper mode of transferring a cause to the Federal Court with the orderly methods of preparing a case for the decision of the higher court. The motion petition and affidavit to transfer the cause to the Federal Court could not in any way have any effect on the trial of the cause in the State Court, nor the statements in that petition be used as evidence in any other motion whatever. That petition and affidavit must (*a*) state such facts as required the State Court to transfer the cause to the Federal Court. (*b*) It must have been filed at the proper time and in the proper manner, and (*c*) it must be made by the accused at the proper time and in the proper mode a part of the record on which the appeal to the Court of Appeals was taken. Now we have in our brief in the motion for a writ of *certiorari*, and on the cause submitted our views on these propositions. The point we now submit is that this affidavit can not be now used as evidence on any other question, and that the effort of the counsel to use the statements as if they were evidence, is wholly improper.

There may be two very distinct questions—1. Did the court err in not granting the transfer? If so, and the record contains in proper form the ruling and the exceptions, then this court will reverse and refuse to consider the other question, which is (2): Did the court err on any Federal question?

On this we submit that the petition and affidavit for transfer can not be read. Besides, they are not by the law of Kentucky testimony; nor were they admitted as such by consent.

3. The counsel further draws his statement of the facts from some other source than the record.

We will ask leave to point this out on the oral argument.

If the so-called bill of exceptions signed by the by-standers be a part of the record, which we deny, (Civil Code, Sec. 337, Criminal Code, Sec. 282), even then his statements are not borne out by the record. If that be not a part of the record, as we confidently assert, then the case presented in his brief and the record are two very dissimilar cases.

4. The counsel also confuses the authorities quoted. We have not had time to examine all, but as specimens we refer to the following:

(A.) Hall vs. Com. Hardin, 479; Wright vs. Nichols, 1. Bibb, 298; refer wholly to the statute concerning the preparation of bills of exception in force from 1800 until after those decisions; a statute very unlike the one now in force.

(B.) The Louisville Rock and Lime Company, vs. Kerr, 78, Kentucky 13; decides the exact opposite to the proposition the counsel quotes it as approving.

(C.) River Bridge Co., vs Kansas Pacific Railway Co., 92 U. S. 316, has no reference or application whatever to the point the counsel is discussing when he refers to it.

We reserve the privilege to point out similar inaccuracies in other citations.

Respectfully submitted,

J. D. Hunt,

Wm. C. P. Breckinridge,

Counsel.